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The Texas Prosecutor

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"It shall be the primary duty of all prosecuting attorneys ... not to convict, but to see that justice is done."
Art. 2.01, Texas Code of Criminal Procedure

Reflecting on the church shooting in Sutherland Springs

Last Saturday night, my husband and I went to dinner at a local restaurant. While we were finishing our food, some friends, the Workmans, came in to eat.

By Katie Etringer Quinney
Victim Assistance Coordinator in the 81st Judicial District Attorney's Office

As we are all saying our hellos and exchanging hugs, which has become customary with this family, Colby Workman said excitedly, "Guess who drove us here?!" I knew the answer. Kris, her husband, had recently told me all about their new van, which is specially outfitted with the accelerator and brake by the steering wheel. He could finally drive again after he was shot in the spine at close range on the morning of November 5, 2017, just before the start of Sunday services at the First Baptist Church of Sutherland Springs. His mother had watched in helpless horror as it happened.

But Kris and his family have tremendous strength, both mentally and physically. This strength, coupled with their unwavering faith, have moved them forward from the horror of that shooting to today, about a year later, where Kris is regaining some independence with the new van. Kris's progress has been astounding since the shooting that killed 26 and injured 20, all members of a very small town and an even more close-knit church. And his is just one story of so many. The shooting was one of the most traumatic and emotional things I will ever go through—because Sutherland Springs is my community too. The church is three miles from our house.

The gunman killed himself before law enforcement could arrest him, so there will never be a trial, no chance for the survivors, like Kris, and the families left behind to confront him in court. But the fact that the killer won't face justice in our courthouse doesn't mean that the 81st Judicial District Attorney's Office hasn't been deeply engaged with these families and survivors, nearly from the get-go. We've actually been intimately involved in the shooting's aftermath, from an hour after it happened (when our DA, Audrey Louis, and ADA Lorena Whitney arrived at the scene) to even now, as I pick up crime victims' compensation (CVC) paperwork from various families on my way to work and

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Mandatory *Brady* training now online

The wait is over! Thanks to the support of the Court of Criminal Appeals and the Criminal Justice Section of the State Bar, mandatory *Brady* Training is now online at www.tdcaa.com.

To review: Every state criminal prosecutor in Texas had to take the initial course in 2014, and by Court of Criminal Appeals rule must complete a refresher course in the fourth calendar year after the initial course. That means a bunch of prosecutors must take the training by the end of 2018. In addition, all new prosecutors must complete the course within 180 days of starting in the profession.

The training on our website is free. It is worth one hour of MCLE/ethics, and it complies with the mandatory *Brady* training requirement. Upon your completion of the course, TDCAA will report the hour of MCLE ethics and *Brady* training to the State Bar.

A suggestion: Why not ask staff and police officers to take the course? One of our challenges is to make sure everyone on the State's "team" is pulling in the same direction, and this course offers good insights into why we do what we do with discovery and what problems—and solutions—are out there. If you have any questions, comments, or suggestions about the course, let me know at Robert.Kepple@tdcaa.com.

Honored guests at the Annual Board dinner

Each year in conjunction with our annual conference, we host a dinner for our association and foundation board members, past presidents, and honored guests. I was delighted that this year two luminaries in Texas criminal justice joined us: **Tom Hanna** and **Judge Larry Gist**. Tom Hanna is a former DA in Jefferson County and former TDCAA president, and he served as the Chair of the TDCAA Penal Code Committee when the code was written and enacted in 1974. (More on that in the next edition of this journal.)

Judge Larry Gist is a retired district court judge in Beaumont who has been active for decades in state criminal justice issues. Significantly, he chaired the Penal Code Subcommittee to the 1993 Punishment Standards Commission that—you guessed it—rewrote the aging 1974 Penal Code. It was wonderful to have two great friends of the profession with us that evening. Great to see you, Tom and Judge Gist!

By Rob Kepple
TDCAF and TDCAA Executive Director in Austin

Is there someone you want to honor?

We get to know some great people in our profession. It is truly an honor to work alongside some of the finest lawyers in the country for our cause. If you feel that way about someone you know, perhaps one way to recognize that person is with a gift to the Foundation in his or her honor.

Case in point: **Beth Toben** and **Mark Parker** were a trial team in the McLennan County CDA's office for 18 years. They were pretty much the stuff of legend in central Texas. Beth has moved to a different office, but Mark has continued to serve in Waco for 30 years, for which he was just honored at the courthouse. Beth recently honored Mark with a gift to the Foundation as a way to be part of the future of the profession. Thanks, Beth! And thank you to Mark for your continued work to represent the people of your community in criminal court. ❇

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About *The Texas Prosecutor*

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Thanks to those who have served

Being an elected prosecutor is a tough and rewarding job. You are sent into a courthouse with a mission to simply do justice, which is both the simplest and the hardest job in the world.

By Rob Kepple
TDCAA Executive Director in Austin

I admire everyone who steps up to take on this challenging and at times thankless job. So thanks to my friends who will be leaving their posts at the end of the year: **Matt Bingham** (CDA in Smith County); **Carl Dorrough** (CDA in Gregg County); **John Healey** (DA in Fort Bend County); **Steve Hollis** (CDA in Jasper County); **Nico LaHood** (CDA in Bexar County); **Randall Lee** (CDA in Cass County); **Chris Martin** (CDA in Van Zandt County); **Matt Powell** (CDA in Lubbock County); **Abel Reyna** (CDA in McLennan County); **Maureen Shelton** (CDA in Wichita County); **Coke Solomon** (CDA in Harrison County); **Steve Tyler** (CDA in Victoria County); and **David Weeks** (CDA in Walker County).

Highlights of the Annual Update

Nearly 1,000 Texas prosecutors and staff gathered at the Moody Gardens in Galveston for our Annual Criminal and Civil Law Update. By all accounts it was a terrific training—and when all the training rooms were full at noon on Friday, we knew it was a valuable event! At the top of the list was Michigan Assistant U.S. Attorney **Kevin Mulcahy**'s keynote presentation, "Randy and Me," which offered insight into the thoughts, emotions, and pain of a victim of childhood sexual abuse. Kevin reminded everyone in the room that prosecutors have the opportunity to be heroes to scared children facing their abusers in court.

A close second was Friday's final session about *Brady* and discovery compliance. **Kevin Petroff** (First Assistant CDA in Galveston) and TDCAA's own **W. Clay Abbott** offered insights into how to handle issues of compliance with *Brady*, Rule 3.09(d) of the Texas Disciplinary Rules of Professional Conduct, and the Michael Morton Act. Attendees also thought that the case studies presented throughout the seminar were very valuable.

Although helpful for most, some folks said the presentations were "too basic" while others said "too advanced." Hitting that "sweet spot" of the experience level in trial advocacy sessions is always the challenge for the Training Committee in designing the Annual course, but rest assured that we continue to work on it.

Finally, one of the most important sessions for some was the Diversity, Recruitment, and Retention Committee's roundtable discussion on Friday morning (complete with breakfast tacos!). The committee members, directed by **Sharen Wilson** (CDA in Tarrant County) and moderated by **Jeremy Sylestine** (ADA in Travis County), engaged TDCAA members in energetic roundtable discussions that explored race and gender issues within prosecutor offices and our criminal justice system as a whole. The discussion was a great way to continue the dialogue about increasing diversity within our profession and addressing race and gender issues. It is a challenging and long-term project to be sure, and you will see more work on it in the near future at TDCAA trainings.

Student loan forgiveness

Some of you might recall that in 2007 the federal government created the Public Service Loan Forgiveness Program. The concept was simple: reward people who dedicate 10 years of their life to public service (such as prosecution) by forgiving their federal student loans at the end of that time period.

But it appears that the program has not been meeting expectations. You can read about it here:

https://slate.com/business/2018/09/public-service-loan-forgiveness-program-applicant-rejections.html. My question is, how many Texas prosecutors have enrolled, and has anyone actually received forgiveness? If you have experience with this program, please share it with me at Robert.Kepple@tdcaa.com. I will report what I have heard in an upcoming issue of this journal.

Outgoing Board members

TDCAA enjoys the work of a very active board of directors. I'd like to personally thank the board members who will be concluding their service at the end of the year: **Randall Sims** (DA in Potter & Armstrong Counties); **Greg Willis** (CDA in Collin County) **Teresa Todd** (CA in Jeff Davis County); **Landon Lambert** (CA in Donley County); **Dusty Gallivan** (CA in Ector County); **Steve Tyler** (CDA in Victoria County); and **Kriste Burnett** (DA in Palo Pinto County).

For those who wish to serve, there is always a place, so we will be counting on your leadership in the future!

Congratulations to Mike Snipes

Congratulations to **Mike Snipes** (First Assistant CDA in Dallas County) on his recent recognition by the *Texas Lawyer* magazine as a Litigator of the Week. Mike prosecuted a Balch Springs police officer for the shooting death of 15-year-old Jordan Edwards. You can read about it at www.law.com/texaslawyer/2018/09/05/litigator-of-the-week-a-rare-murder-conviction-of-a-police-officer. By all accounts it was a tough case for the prosecution, but Mike was willing to lead by example and take it on himself. Why? Mike explains in the article: "I can't overemphasize this," Snipes said. "To me, Mike Snipes, the case was never a political case. It wasn't about white vs. black or Democrat vs. Republican. I didn't do it because of that. I did it for the kid. If you knew the kid like I did, you would love him."

MADD honors ADA Chari Kelley

Mothers Against Drunk Driving have honored **Chari Kelly** (Assistant DA in Travis County) as its 2018 Prosecutor of the Year. The award recognizes a prosecutor who has gone above and beyond in prosecuting DWI cases and ensuring that those who drink and drive face appropriate consequences for their actions. In particular, Chari was recognized for her 2017 prosecution of Joseph Cantu, who killed University of Texas track athlete Philip Wood in a hit-and-run collision. Congratulations on a well-deserved recognition!

Prosecutors honor Joan Huffman

Recently some prosecutors gathered in Austin to thank **State Senator Joan Huffman** for her efforts in the last legislative session. Senator Huffman, a former Harris County Assistant District Attorney and district judge, had a very active session. She passed some significant legislation, including SB 227 (the "Adderall fix"), SB 1232 (bestiality), SB 1264 (grand juror counseling), SB 1298 (larger grand jury panels), and SB 1329 (omnibus new courts bill). She also sponsored some House bills in the Senate, including HB 29 (omnibus trafficking bill), HB 281 (rape kit tracking system), HB 2529 (coercion in trafficking cases), HB 2552 (prostitution and trafficking), and HB 2612 (civil liability for providing synthetic drugs). That is a lot of work in one session!

State Senator Joan Huffman (R-Houston)(center, holding award) received TDCAA's Law & Order Award for her successful passage of numerous criminal justice and public safety bills during the 85th Regular Session (2017), including measures proposed by prosecutors from various counties throughout Texas. The award was presented this past October in the Senate Chamber by representatives of TDCAA's Board of Directors, including (from left to right) Ellis County & District Attorney Patrick Wilson, 112th Judicial District Attorney Laurie English, TDCAA Executive Director Rob Kepple, Kaufman County Criminal District Attorney Erleigh Wiley, Brazos County District Attorney Jarvis Parsons, and Galveston County Criminal District Attorney Jack Roady. (Photo provided courtesy of Texas Senate Media.)

Carol Vance, a progressive prosecutor

I fear that many of our younger prosecutors may not know **Carol Vance**, a former Harris County District Attorney and partner at the law firm now known as Bracewell LLP. Carol is a leader in our profession, having been the driving force to obtain grant funding that launched TDCAA's training efforts in the 1970s. He led by example during his tenure, but even more impressive is his continued devotion to the rehabilitation of incarcerated individuals.

Carol recently sent his regrets that he could not attend our annual conference, and his RSVP email to me tells you everything you need to know about this true Texas hero: "Rob, I cannot make the TDCAA meeting as I am starting a new bible study at the Carol Vance Unit that very night. By the way, I am starting class No. 67 and have been doing this about 20 years. Our recidivism rate for our graduates is only 8 percent (not 24 percent for similar inmates) so I am still trying to cut down on crime. Let me congratulate you for the wonderful work TDCAA does for all the prosecutors in Texas. As one who had a little something to do with the start-up, let me say thanks. Keep up the great work. I still read the articles in the journal. They are excellent. Wish we had had all this good education back in my eight years as an assistant and 14 more as Harris County DA. You all done good. Keep me on the list."

Thank you, Carol. You are an inspiration.

A crime writer update

We have some talented fiction authors in our membership, and I like to keep you up-to-date on their work. **Jay Brandon**, an appellate prosecutor in the Bexar County CDA's Office, has written by our count 19 books, most of them mysteries. His latest, *Against the Law*, is terrific. The protagonist is a former prosecutor, Edward Hall, who goes back to court to defend his sister when she is accused of killing her husband. The mystery keeps you guessing until the end—Jay does a terrific job of setting up several possible perpetrators.

As a professional writer in his day job, the book is (unsurprisingly) really well-written. And the story is set in the Harris County Criminal Courts Building, pre-Hurricane Harvey. Jay's characters are well-developed, and the story is a page-turner. Best of all, his publisher just gave Jay a contract for a sequel.

You can buy *Against the Law* on Amazon. My favorite line: "Secretly criticizing is an addiction. You can't restrict it."

Criminal Justice Reform Phrase Guide

Another regular update I like to offer is on trends in criminal justice language. Popular phrases from the recent past include "evidence based," "evidence informed," and "deep dives."

Well, turns out someone has just printed a guide to politically correctcriminal justice phraseology. You can find it at https://opportunityagenda.org/explore/resources-publications/criminal-justice-reform-phrase-guide. The guide offers a way to take some normal criminal justice vernacular and turn it into a "people first" term, which is a current effort in all corners of our culture, including at the Texas legislature. So "ex-cons" become "people who have paid their debt to society." "Bad guys" are now "people charged with or accused of a crime." A "prostitute" is a "sex worker." You get it; people-first language tries to avoid judgment.

Some of the recommendations are a little more nuanced. For instance, the author suggests that people should avoid making distinctions between violent and non-violent crime, as that will slow down broad-based reform efforts. So, instead of talking about "nonviolent drug offenses," people who are reformed-minded (see what I did there? I'm using people-first language!) should talk instead about "appropriate offenses and less serious offenses." And we should avoid talking about "law and order," and instead speak of "accountability, rehabilitation, restoration, equal justice, and due process." I think this last group of suggestions is going to take more time to "unpack."

Square One Project

And trading on the phraseology theme, a new nonprofit called the Square One Project promises to "re-imagine" criminal justice. (Read about it at www.squareonejustice.org.) This is a new effort by the established reform organizations in criminal justice, the John D. and Catherine T. MacArthur Foundation and the Laura and John Arnold Foundation, and it starts with an intriguing question. "If we start over from 'square one,' how would justice policy be different?" I'm in. It sounds like a great way to look at issues that the system has struggled with for years. ❇

How close is close enough? Tolling the statute of limitations with a prior indictment

A pending indictment tolls the statute of limitations. But does the indictment have to be for the same offense that is ultimately tried, or can any indictment achieve tolling?

By Andrea L. Westerfeld
Assistant County & District Attorney in Ellis County

In 2004, the Court of Criminal Appeals determined that an indictment for a different offense could toll for any other offense alleging the same conduct, act, or transaction. But this year in *Marks v. State*, the Court revisited and greatly restricted that opinion, limiting for practical purposes Art. 12.05(b) to only the same offense or a lesser-included offense.

Article 12.05(b) and *Hernandez*

When calculating a period of limitations, the time during the pendency of an indictment, information, or complaint is not included.[1] "During the pendency" counts from the day the indictment is filed until the day it is invalidated for any reason,[2] but does "an indictment" mean just an indictment charging the same offense, or does it mean any offense at all? The statute does not specify.

The Court of Criminal Appeals first considered that issue in 2004 in *Hernandez v. State*.[3] Hernandez was originally charged with possession of amphetamine, but after further testing, the State filed a new indictment for possession of methamphetamine. Unfortunately, the statute of limitations had run before the second indictment was filed; therefore, the State could prosecute only if the amphetamine indictment tolled the limitations period for methamphetamine.

In analyzing Art. 12.05's text, the Court acknowledged that the statute required only *an* indictment, not one for the same offense or even the same conduct. There was no guidance at all for how related they must be. Thus, the Court turned to the rules of statutory construction. Reading it to include *any* indictment would lead to an absurd result because the State could frustrate the purpose of the statute of limitations—requiring due diligence in obtaining and giving the defendant the opportunity to prepare a defense—by continually filing unrelated indictments. Thus, the Court concluded that the Legislature intended something more limited. Instead, it concluded, the two indictments must both allege "the same conduct, same act, or same transaction" to apply.[4] Because the conduct at issue in Hernandez's two indictments was the same (possession of a controlled substance), the amphetamine indictment tolled the statute of limitations for the methamphetamine indictment.

Marks v. State

The procedural standpoint in *Marks* was different from *Hernandez*, but both revolved around the interpretation of Art. 12.05(b). Marks was originally charged with acting as a guard company by providing security services without a proper license.[5] Later, the indictment was amended to charge him with accepting employment as a security officer to carry a firearm without a security officer commission.[6] Both offenses come from the same chapter of the Occupations Code, and both are Class A misdemeanors. By the time the State amended the indictment, the statute of limitations for the security guard offense had run, unless it was tolled by the guard company charge.

The Court of Criminal Appeals considered the case under *Hernandez*. Significantly, the Court found that the record would not support conviction on the original indictment.[7] Under the

new indictment, the State did not need to prove that Marks provided any security services, but under the original indictment, the State did not need to prove that Marks carried a firearm. A defendant reviewing the original indictment would not have any notice that he would need to defend himself against matters raised under the second indictment. Therefore, the matters did not involve the same conduct, act, or transaction.

The Court noted two things that could have led to a different result. First, the guard company indictment could have included enough specific facts to cover the security officer offense.[8] But the indictments here tracked only the language of the statute without many specific facts. Additionally, the dates in both indictments were the same,[9] but the Court decided that was not enough to conclude they alleged the same act or transaction because both dates were alleged as "on or about."

Marks *drew sharp dissention, with four judges opposed to the decision and two dissents authored.*

The dissents

Marks drew sharp dissention, with four judges opposed to the decision and two dissents authored. Judge Keasler, joined by Judges Hervey and Newell, noted that they had determined in *Hernandez* that Art. 12.05(b) should be read broadly and that two offenses did not have to come from the same statute to toll limitations.[10] Both sets of indictments in *Marks* "targeted the same three incidents, on the same three dates, arising from the same set of facts, made criminal within the same Private Security Act."[11] It was unlikely that a defendant would have needed to preserve any different evidence to defend himself against either crime. Although the two offenses would have required slightly different proof, that will always be true when different statutory offenses are alleged. Thus, the first indictment should have tolled limitations.

Judge Yeary took a stronger approach. He concluded that the text of Art. 12.05(b) did not require any connection between the two indictments to toll limitations but, contrary to *Hernandez*, he decided that this was not an absurd result and the Legislature should be taken at its word.[12] He concluded that the court never should have engaged in statutory construction when the meaning of the statute was clear; the court should have overruled *Hernandez*, and Marks's first indictment should have tolled limitations regardless of any connection to the second.

The *Marks* test

Going forward, what test can be derived from *Marks* to analyze future cases? Although *Marks* did not expressly overrule *Hernandez*, practically speaking, it did. The focus is no longer on the act, conduct, or transaction; instead, analysis focuses solely on the elements of the two offenses. If the first indictment did not allege the same elements—or enough facts to include the elements of another offense—then it does not toll limitations for the second indictment. *Hernandez* is effectively overruled because its facts would not have passed this test. After all, each indictment required proof of an elemental fact not included in the other indictment—one required possession of amphetamine, and one required possession of methamphetamine. The offenses occurring on the same date is irrelevant, because the indictment charged "on or about" a date rather than a specific date.

Essentially, *Marks* has limited the tolling provision solely to the same offense or a lesser-included offense, because those are the only ones where the elements will be the same. If an indictment includes more facts than simply tracking the language of the statute, then those facts may be considered as well and might expand to include more offenses. But the Court of Criminal Appeals has drawn a very strict line on the application of Art. 12.05(b). That line may be relaxed again in the future, considering it was a narrow opinion, but for now, *Marks*'s restrictive reading prevails. Unless the second indictment covers the same offense as the first or a lesser-included offense, the first indictment cannot be relied upon to toll the statute of limitations. ❇

Endnotes

[1] Tex. Code Crim. Proc. Art. 12.05(b).

[2] Tex. Code Crim. Proc. Art. 12.05(c).

[3] *Hernandez v. State*, 127 S.W.3d 768 (Tex. Crim. App. 2004).

[4] *Id*. at 774.

[5] Tex. Occ. Code §1702.102(a)(1).

[6] Tex. Occ. Code §1702.161(a).

[7] *Marks v. State*, Nos. PD-0549–51-17, 2018 Tex. Crim. App. Lexis 921 at *3-4, slip op. at 3-4 (Tex. Crim. App. Oct. 3, 2018).

[8] *Marks*, 2018 Tex. Crim. App. Lexis 921 at *4, slip op. at 4.

[9] *Id*.

[10] *Marks*, 2018 Tex. Crim. App. Lexis 921 at *7, slip op. at 2 (Keasler, J., dissenting).

[11] *Marks*, 2018 Tex. Crim. App. Lexis 921 at *7-8, slip op. at 4 (Keasler, J., dissenting).

[12] *Marks*, 2018 Tex. Crim. App. Lexis 921 at *12-13, slip op. at 3 (Yeary, J., dissenting).

Recent gifts to the Foundation*

Richard Alpert
Kathy Braddock
Jack Choate
Skip Cornelius
Michael Criswell
Ramon Echevarria
Laurie English
Tony Fidelie
David Finney
Elizabeth Godwin
William Hawkins, Jr.
John Healey, Jr.
Dan Heard
Lee Hon
John Hubert
Ed Jones
Rob Kepple *in memory of Justin Cunningham*
Tom Krampitz
Doug Lowe
Mackenzie Lozano
Ken Magidson
Lyn McClellan *in honor of Bill Hawkins*
Lyn McClellan *in honor of Brett Ligon*
Lyn McClellan *in honor of Chuck Rosenthal*
Don Stricklin
Jennifer Tharp
Beth Toben *in honor of Mark Parker*
Sharen Wilson
Justin Wood

* gifts received between August 3 and October 5, 2018

New online portal for Crime Victims Compensation

I wanted to spread the exciting news about a just-launched Crime Victims' Compensation portal now available for crime victims and victim services providers.

By Jalayne Robinson, LMSW
TDCAA Victim Services Director

This portal (www.texasattorneygeneral.gov/crime-victims/crime-victims-compensation-program/apply-crime-victims-compensation) should improve timeframes in the CVC application process as well as provide a way to upload crime-related bills directly to the portal.

The Crime Victims' Compensation portal is intended to provide Texans with better, faster access that streamlines the application process while providing current information regarding application status. "This portal will make the application process easier to navigate and help victims and claimants understand every step of the compensation process," First Assistant Attorney General Jeff Mateer said in a press release. "This is a very effective solution to simplify and expedite getting victims and claimants financial help when they need it."

Tree of Angels

The Tree of Angels ceremony is a meaningful Christmas program specifically held in honor, memory, and support of victims of violent crime. The first program was implemented in December 1991 by Verna Lee Carr, Victim Advocate with People Against Violent Crime (PAVC) in Austin.

The Tree of Angels program provides an opportunity for communities to recognize that the holiday season is a difficult time for families and friends who have suffered the crushing impact of a violent crime. This special event supports surviving victims and victims' families by making it possible for loved ones to bring an angel ornament to place on a Christmas tree.

Over the past 27 years, the Tree of Angels has become a memorable tradition observed in many communities throughout Texas. The designated Tree of Angels week is December 2–8, 2018. If you are interested in hosting a Tree of Angels in your community in the future, a how-to guide is available to provide information about establishing such a ceremony.

Please note the Tree of Angels is a registered trademark of PAVC, and PAVC is committed to ensure that the original meaning and purpose of the Tree of Angels continues. For this reason, PAVC asks that you complete the information form on the website www.treeofangels.org to receive the how-to guide. After the form is completed and submitted, you will receive instructions on how to download the guide. PAVC asks that you do not share the electronic document to avoid its unauthorized use or distribution.

If you have any questions regarding the guide or about hosting a Tree of Angels in your community, please contact Licia Edwards at 512/837-PAVC or via email at pavc@peopleagainstviolentcrime.org.

TDCAA would love to publish photos and success stories of your Tree of Angels event in an upcoming issue of *The Texas Prosecutor* journal. Email event information and photos to me Jalayne.Robinson@tdcaa.com.

In-office visits

TDCAA's Victim Services Project is available for in-office support to your victim services program. We at TDCAA realize the majority of victim as-

sistance coordinators (VACs) in prosecutor offices across Texas are the only people in their office responsible for developing victim services programs and compiling information to send to crime victims as required by Chapter 56 of the Code of Criminal Procedure. We realize VACs may not have anyone locally to turn to for advice and at times could use assistance or moral support.

My TDCAA travels have recently taken me to Harris, Hood, Van Zandt, Ector, and Burnet Counties to assist VACs, prosecutors, and staff with in-office consultations for their prosecutor-based victim services projects. (See some photos of my trips on this page.) Thanks to each of these offices for allowing us to offer support! I thoroughly enjoy my job and travels across Texas. I realize how nice it is to have someone to turn to when victim services-related questions surface.

Please e-mail me at Jalayne.Robinson@tdcaa.com for inquiries or support or to schedule a consultation or presentation. ❇

TOP PHOTO: From the 33rd & 424th Judicial District Attorney's Office, Angela Smith, Bailey Rogers, and Rachel Thompson. SECOND FROM TOP: From the Van Zandt County CDA's Office (left to right): Jalayne Robinson, TDCAA Director of Victim Services; Malisa Chaney, VAC; and Chris Martin, Criminal District Attorney. MIDDLE PHOTO: From left to right: Joann Lujan and Erika Marquez from the 109th District Attorney's Office in Winkler and Crane Counties; Ivette Ramirez of the Ector County Attorney's Office; Jalayne Robinson, TDCAA Director of Victim Services; Barbara Ventolini of the Ector County District Attorney's Office; Cesira Scarnici and Linda Granados with the Ector County Attorney's Office; and Andrew Thomas, Crime Victim Liaison with the Odessa Police Department. FAR LEFT: From the Harris County DA's Office (back row): VACs Edith Flores, Patricia West, and Alessy Marlin; and Celeste Byrom, Assistant District Attorney and Victim Services Director. In the front row: VACs Irma Moreno, Holly Heil, Poonam Chhabra, and Jackie Mayoral. AT LEFT: From the Hood County Attorney's Office, VAC Maury Estrada.

Photos from our Annual Update

Award winners from the Annual

Several awards were presented at TDCAA's Annual Criminal & Civil Law Update in Galveston. TOP PHOTO: Laurie English, the 112th Judicial District Attorney (at left), was honored with the State Bar Criminal Justice Section Prosecutor of the Year Award for her tireless work as the elected prosecutor with the largest jurisdiction (in terms of square miles) in the country. Jennifer Tharp, Comal County Criminal District Attorney and TDCAA President (at right), presented the award. SECOND FROM TOP: Kevin Petroff, First Assistant Criminal District Attorney in Galveston County (at left), was named the C. Chris Marshall Award winner, which is presented to distinguished TDCAA faculty. He received the award from Bill Wirskye, First Assistant CDA in Collin County (at right), the chair of TDCAA's Training Committee. SECOND FROM BOTTOM: Michael Garza, an ACDA in Hidalgo County, was honored with the Lone Star Prosecutor Award, which is meant to recognize the hard work of those prosecutors "in the trenches." Garza spent much of the past two years trying Paul Feit, a former Catholic priest, for the cold-case murder of Irene Garza (no relation), who was bludgeoned to death in 1960. Erleigh Wiley, the CDA in Kaufman County, presented the award to Garza. BOTTOM PHOTO: Mike Holley, First Assistant DA in Montgomery County, was honored with the Oscar Sherrell Award, which recognizes exceptional service to TDCAA, for his tireless work on our Editorial Committee, which oversees production of this journal. Pictured with him is Kenda Culpepper, the CDA in Rockwall County and TDCAA Board Secretary-Treasurer, who gave him the award. Congratulations to all of these winners on these well-deserved recognitions! ❇

A roundup of notable quotables

"I don't need to be a criminal anymore, and that's a great feeling. And my new dealer is the prime minister!"

—Canadian Ashley MacIsaac, in a news article about Canada's recent legalization of marijuana possession and sales. www.myplainview.com/news/medical/article/Canada-now-world-s-largest-legal-marijuana-13313115.php

Have a quote to share? Email it to the editor at Sarah.Wolf@tdcaa.com. Everyone who submits a quote will get a free TDCAA ball cap!

"When he said he wanted me dead, I took him at his word."

—Collin County Assistant Criminal District Attorney Crystal Levonius, who had been working up a case against Daniel Steffen, later testifying in Steffen's trial. Steffen was accused of sexual assault of a child (among other things), and in a recorded phone call, he had told someone he wanted to do "whatever it takes" to kill Levonius. At that, she was removed from the case, and the Collin County office recused itself. Dallas County ACDAs Jason Fine and Trey Stock were assigned as special prosecutors, and Steffen was convicted of sex crimes and solicitation to commit capital murder in September. He was sentenced to life in prison.
https://www.dallasnews.com/news/courts/2018/09/13/plano-man-preyed-young-boys-plotted-kill-prosecutor-gets-life-sentence-horrendous-crimes

"Very, very small. And very dark."

—Sgt. Brad Makovy of the Grand Prairie Police Department's Crimes Against Children Unit. He was testifying in the capital murder trial of Charles Wayne Phifer, who was later convicted of beating to death his girlfriend's 4-year-old daughter, Leiliana Wright. Sgt. Makovy was describing a closet in the family's home where Leiliana had been "strung up" as punishment before she died.
https://www.dallasnews.com/news/courts/2018/10/11/4-year-old-suffered-like-no-child-grand-prairie-cop-seen-before-testifies-murder-trial

"Over the weekend, I visited upstate NY, where I got arrested & later did time. And it kind of holds a special place in my heart bc it's where I got my life back together. But someoneasked [sic] me where my dog was & it got me thinking. Here is a thread abt dogs, addiction, and reentry."

—Keri Blakinger (@keribla on Twitter), a journalist at the *Houston Chronicle* newspaper (and former felon). The thread (from October 15) is worth reading.

"I don't know if I hate you or I thank you for finally speaking up and giving me my daughter back."

—Fallon Wood, in a victim impact statement given at the trial of Gregorio Cruz. Cruz admitted to police that he didn't kill Breanna Wood, Ms. Wood's daughter, but that he was paid to dispose of her body. He led authorities to her remains.
https://www.caller.com/story/news/crime/2018/10/16/man-gets-8-years-evidence-tampering-death-breanna-wood/1653418002/

"The law is so complex and ambiguous, very learned people can have very different opinions on what a line of statute means. It's highly unlikely that someone is going to go to jail [just for cannabidiol], but I cannot sit here and say that it is my legal opinion that it is a legal chemical."

—Kyle Hoelscher, a Corpus Christi attorney and pro-marijuana activist, in a news article on the growing (illegal) sales of cannabidiol (CBD) in Texas.
https://www.statesman.com/news/20181012/despite-legal-uncertainty-sales-of-cannabis-extract-booming-in-texas

Reflecting on the church shooting in Sutherland Springs (cont'd)

then return it to them (after filing it) on my way home. It's still a part of our daily lives.

And as such, we have learned a lot—more than we ever wanted to—about major trauma events and dealing with their wake. Having been on the job as the lone victim assistance coordinator (VAC) in the DA's Office for just under a year at the time, I felt woefully unprepared for a mass shooting in our small community—but then again, how can anyone ever properly prepare for such a thing? There are, however, a few lessons I learned that I can pass along to VACs and prosecutors in other offices in the hope that they might give you a starting point, should you face a similar tragedy in your jurisdiction. Because given the state of the world, it's not really a matter of *if* such a thing will happen again, but when and where.

Lesson One: Find a location for families to wait for news.

Sutherland Springs is really small. By the last census count, it was home to 600 people. As soon as news of the shooting got out—and that happened quickly—families of people who were in the church rushed to the scene, only to find it (appropriately) blocked off by police. At first people were told to gather at the Sutherland Springs Community Center, which is about a block and a half away, but it was quickly apparent that this was a poor location. There is no air conditioning in that building, and there was only one women's and one men's restroom. Plus, the media was incredibly intrusive, and there was no way to keep reporters away. We had to relocate the families.

Luckily, the pastor of another church just two miles north offered his church as our Family Assistance Center (FAC) . It was a much better space for families to gather and await word from law enforcement on their loved ones. And later, when the Texas Rangers arrived to notify the families of those who had died, we set aside private rooms (and RVs had been brought in) for those notifications. All of our notifications were done by one the next morning.

Identifying a building that can serve these purposes—somewhere comfortable and with private spaces for notifications—is essential to care for victims' families, and the church couldn't have provided better accommodations for us. We were there for the next two weeks.

Lesson Two: Mark families, clergy, counselors, etc., with a bracelet or other identifier.

Before we moved and the Family Assistance Center could be set up at the other church, we needed a way to identify all of the people who had gathered at the community center. We opted to make them bracelets out of duct tape, which we picked up at the nearby Dollar General, to mark them as families, clergy, counselors, law enforcement, victim services, etc. We took down their names, as well as the names of their loved ones in the church who were unaccounted for (potential victims).

When the American Red Cross arrived an hour or two later, those workers went even further and supplied people with plastic bracelets denoting who they were. After the Red Cross arrived, no one would be admitted into the Family Assistance Center without a bracelet—it was a way to keep the media at bay and let families wait in peace (or, in as much peace as was possible, given the situation) without being overrun by media and bystanders.

Lesson Three: Decide how to handle victims' personal effects.

In the days following the shooting, once all of the deceased were identified and their next of kin notified, we were faced with the issue of how to handle all of the victims' personal effects that were left behind in the church. There was everything from kids' coloring books and sippy cups, to cell phones, purses, bibles, and clothing. Many of these items were stained with blood, and the Federal Bureau of Investigation (FBI) sent them off to a facility that cleaned them. We were astounded when the personal effects were returned: Bibles whose pages had been blood-soaked were completely clean, but the owners' handwritten notes in the margins were intact. Cell phones, too, were cleaned of blood and other matter and returned to us looking nearly new.

FBI Victim Services returned some of the

My favorite thing is when people ask how the survivors and the families are doing. I am so proud to report that they are healing! They actually held church services the Sunday after the shooting. They're the most faithful people you'll ever meet, and because of their faith, they have healed from the inside out.

personal belongings themselves to victims with whom they specifically had met and who were unable to come to the FAC because of their injuries. We tried very hard to reunite next-of-kin with their loved ones' cell phones—these days, so many people keep photo albums on their phones and nowhere else—and doing so was no easy task. Without passcodes or fingerprints, we couldn't even open most of the phones to identify the owners. Then Audrey (our DA), a deputy with the Wilson County Sheriff's Office, and I hit upon a solution: We made arrangements with the local 911 dispatch that we would press the "emergency" button on each phone (which you can do without unlocking it), and the 911 operator would record the phone number as it popped up and find out to whom that number belonged. Some of the phones didn't require a passcode to open, so on those, we looked for the Facebook app. If Facebook was on the phone, we opened it so we could see the owner's profile and identify him or her that way. For some phones that we still were unable to open or that had been damaged, one of the investigators in our office took them to the local phone stores (AT&T, Sprint, etc.) and had workers there identify the owners.

Once we got all of the items back from the Texas Rangers and the FBI's cleaning crew, the victims' belongings filled nine banker boxes. We identified as many things as we could the easy way (by looking in bibles for names and purses for driver's licenses) and gave them to the owners' families. People would also call our office asking about this or that item, and I'd let them come in and look through the boxes, which were stacked in my office. I also contacted a couple of people at the church (where the shooting occurred), people I already knew, and asked if they would come to my office and go through the boxes with me to see to whom the items might belong. That whittled the lot down to five boxes, which we then moved from my office to the church after about eight months. That way, families can sift through the belongings in their own time and at their own pace.

Lesson Four: The repercussions last a long time.

It's been just over a year since the shooting in Sutherland Springs. Many survivors have kept in close contact with our office for crime victims' compensation purposes and to find personal property, though some have not—some will not file claims with crime victims' compensation because of pending civil cases. And that's OK. But many of them, they just want to talk. They'll call or come to my office to visit, and of course they can do that. I'm not a counselor, but I can listen. The stories of healing and hope are endless.

I'm still submitting receipts and claims on their behalf to crime victims' compensation, and the Attorney General's Office has just been spectacular. I can email or call Doris Contreras in CVC any day, and she takes care of our claims. The Sutherland Springs survivors have a guardian angel in Doris.

My favorite thing is when people ask how the survivors and the families are doing. I am so proud to report that they are healing! They actually held church services the Sunday after the shooting. They're the most faithful people you'll ever meet, and because of their faith, they have healed from the inside out. And not just them—our community too. It's actually contagious to see how they have forged together as a family, as a church, as a town. It is just humbling for your community to come together. I'm proud to be helping them, and I'm proud of the way they've flourished and rebuilt their lives and relationships and community. It's a phenomenal thing to witness. ❇

Forfeiting bail bonds

"Counsel, I have a jury waiting. Where is your client?"

By Benjamin I. Kaminar
Assistant County & District Attorney in Lamar County

These are words that no defense attorney wants to hear. They also indicate a great deal of time and preparation on prosecutors' part are about to go to waste. Sometimes, there's a legitimate reason for the defendant's failure to appear, such as a car accident en route to court or a child who had to go to the emergency room. Far more often, however, the defendant is starring in his own lousy remake of *The Fugitive*, minus the Tommy Lee Jones and Harrison Ford star power. So, what happens when the defendant demands his day in court and then skips it?

The bond

Before we go about dealing with our absentee defendant, we need to back up to the event that set this chain of events in motion: the defendant's release from custody. The right to have bail set is enshrined in Article I, §11 of the Texas Constitution. Bail, as defined by Art. 17.01 of the Code of Criminal Procedure, is "the security given by the accused that he will appear and answer before the proper court the accusation brought against him, and includes a bail bond or personal bond." Art. 17.02 tells us that a bail bond is the written agreement by the defendant and his sureties that the defendant will appear in court. In lieu of sureties, a defendant has the right to deposit his bail in cash with the court in which his prosecution is pending. Under Art. 17.03, a personal bond (sometimes wrongly called a "personal recognizance" or "PR bond")[1] is a bond without any sureties or security. For most purposes, surety bonds, cash bonds, and personal bonds are treated identically.[2] CCP Chapter 17 in general sets out the requirements for a bond, as well as various procedures related to bond conditions, holding bonds insufficient, and surrender of bonds.

When released from custody on bond, the defendant must be told in the bond itself where and when he is to appear, as well as at any time and place required by the court or magistrate thereafter.[3] "Where" is typically satisfied by specifying the district or county court at the courthouse, rather than specifically listing which numbered district court or county court-at-law. "When" may be by listing a date and time certain, but it is far more likely to be "instanter." "Instanter" means right away or immediately, but in practice it means that the defendant will be directed to appear once the case is filed. A bond that doesn't tell a defendant when and where to show up will be fundamentally defective; a defendant can't be penalized for failing to appear if his bond didn't say when and where he had to appear. The use of instanter in a bond has been upheld by the Court of Criminal Appeals in *Euziere v. State*.[4]

The forfeiture

Starting the bond forfeiture process is simple. "When a defendant is bound by bail to appear and fails to appear," the court is required to enter a judicial declaration of the bond forfeiture.[5] Forfeiture is taken by distinctly calling the defendant's name three times at the courthouse door and waiting a reasonable time for him to appear.[6] Although the statute dictates the "courthouse door," calling his name outside the *courtroom* door is sufficient.[7] Frequently, the bailiff performing this duty will complete a certificate documenting the call and file it with the court. The court then enters judgment nisi[8] in favor of the State for the amount the defendant and his sureties are bound, unless good cause is shown why the defendant did not appear.[9] For purposes of a forfeiture proceeding, both the original defendant and his sureties are named as defendants; the original defendant becomes the "defendant-principal" while the sureties each become a "defendant-surety."[10]

At this point, it is critical to identify the proper parties to be included. The defendant is a necessary party and, if he executed a cash or per-

sonal bond, the only party. To determine the proper surety, however, you have to know a little bit about the bondsman's business structure.

Bail bondsmen fall into two broad categories, property and insurance bondsmen. Generally speaking, property bondsmen are individuals DBA (doing business as) their bonding company name, and their bonds are backed by a cash deposit or real property under a deed of trust.[11] Insurance bondsmen will also operate under a DBA, but they are agents for an insurance company that backs the bonds. For a property bondsman, the party to include is the bondsman himself;[12] for an insurance bondsman, the proper party is the insurance company, not the local bondsman/agent.[13] It's possible for a bondsman to have licenses both as an individual and as an agent for an insurance company, so it pays to always check the bond to see which license the bondsman was acting under.[14]

Finally, if your defendant posted a personal bond, good luck with that. Personal bonds are frequently the result of a defendant too indigent to post any other type of bond. Even when not the result of indigence, locating assets subject to execution can be a Herculean undertaking that costs more in time and effort than will ever be recovered.

Citation and service

After the judgment nisi has been entered, citation must issue as with any civil proceeding. Different rules apply to the defendant and the sureties. For the defendant, if he posted a cash bond, citation will be served to his address as listed on the bond or to his last known address. If he had sureties, he is entitled to have notice deposited in the mail directed to him at his address on the bond or last known address. Sureties are entitled to citation under the same rules as in any other civil action. Individual sureties should be served at the address they listed on the bond or their last known address, while corporate sureties should be served through their attorneys for service of process.[15] The Texas Department of Insurance maintains a webpage for looking up company profiles, which include their attorney for service.[16]

Any citation issued is required to include a copy of the judgment nisi, a copy of the forfeited bond, and (if an insurance bondsman) a copy of any power of attorney attached to the forfeited bond. The citation must also instruct the defendant and sureties to "appear and show cause why the judgment of forfeiture should not be made final."[17] Failure to include that specific language in the citation or failure to attach any required copies may be fatal to the forfeiture.[18] Return of service for the sureties is the same as in civil cases;[19] however, because mailing the defendant's notice doesn't necessarily create a record of that mailing, it is frequently useful to have the clerk sending the notice complete a certificate of mailing for the court's file to document that fact and head off an appellate issue.

Answer and trial

Once served, the parties have the usual time as in civil cases to file an answer. However, Art. 22.13 limits the defendant and sureties to five grounds for exoneration "and no other." The first defense is that the bond is not a valid and binding undertaking in law.[20] When this defense is asserted in the context of arguing that the bond omitted one of the requisites listed in Art. 17.08, the Court of Criminal Appeals has held that those elements are required for the benefit of the defendant and sureties.[21] If not insisted on at the time of the execution of the bond, the defendant or surety may not complain about the defect for the first time after forfeiture. A bond will also be considered a valid undertaking even if the defendant is not actually released but instead transferred to some other agency, such as when a defendant posts a bond and is transferred to ICE custody.[22] On the other hand, a bond was held to be invalid where multiple identical bonds were posted for a charge without a finding of some defect or insufficiency in the first bond.[23]

The second ground for exoneration is the defendant's death before the forfeiture,[24] a logical defense as the dead typically have difficulty appearing for trial. However, the defendant's death after the forfeiture is *not* a defense.[25] Ground No. 3 is the defendant's sickness or some uncontrollable circumstance preventing his appearance in court.[26] To assert this defense, the circumstance must arise from no fault of the defendant, and the defendant must appear to answer the original charge against him.[27] This will be a fact-specific issue in each case. Some circumstances that have not saved a defendant from liability under this defense are incarceration in a Mexican prison[28] and deportation from the United States.[29]

The fourth ground for exoneration is the failure to present an information or indictment at the first term of court after the defendant posted the bond.[30] Terms of court are set by statute for district courts[31] and by the commissioners court for the constitutional[32] and most statutory county courts.[33] This effectively sets an "indict by" date for bond forfeiture purposes.

Finally, the fifth ground for exoneration is that the defendant was incarcerated anywhere in

the United States within 180 days of his failure to appear on a misdemeanor or 270 days on a felony.[34] The defendant does not have to have actually been returned to the county for this defense to apply.[35] A surety exonerated under this defense will still have some financial liability, although less than the full amount of the bond[36] (more on that later).

Typically, a surety's answer will plead all five statutory defenses under the logic that if he doesn't plead it, he won't be allowed to prove it. The defendant will often not answer at all, which can prove useful in rebutting an excuse offered at a later trial for the offense of bail jumping. After the surety's answer has been filed and the time for the defendant's answer to be filed has run, the final forfeiture hearing is a fairly straightforward matter. The essential elements of the State's case in a bond forfeiture proceeding are the bond and the judgment nisi.[37] The court may take judicial notice of both.[38] Additionally, as a bail proceeding not relating to a motion to increase, deny, or revoke bail, the rules of evidence do not apply.[39] If the defendant or sureties fail to establish one of their defenses, the judgment shall be made final.[40]

Forfeiting a bond

Once we've successfully run through the gauntlet of requirements to get to a final judgment, the question is, "How much of the bond does the county get?" The bond obligates the defendant and sureties for the amount of the bond, as well as all necessary and reasonable expenses incurred to re-arrest the defendant.[41] The sureties are also liable for court costs for the forfeiture proceeding.[42] If the surety has been exonerated because of the defendant's re-arrest, the surety still has to pay court costs and expenses, plus interest accrued on the bond from the date of the judgment nisi through the date of re-arrest.[43] Caselaw is remarkably scarce on what expenses are reasonable. For a defendant who is re-arrested locally, expenses directly related to the re-arrest may be nonexistent. On the other hand, for a defendant apprehended out of state, the sheriff may have to pay for deputies to travel and bring the defendant back. In some counties, transport service may be contracted out.

If the defendant had a bondsman, receiving payment on the judgment is often a fairly simple matter of the bondsman writing a check.[44] In a county regulated by a bail bond board where a bondsman has security deposited with the county, after 30 days an unpaid judgment shall be paid out of his deposit.[45] Bondsmen try to avoid that whenever possible because their bonding limits are a multiple of their deposits; less money on deposit means they can write fewer bonds. If the defendant posted a cash bond, an order directing the money paid out of the court registry should accompany the final judgment. Although the custodian of funds of the "court in which the prosecution is pending"[46] is the proper custodian for cash bonds, it is not unusual for the sheriff to fail to transfer them to the proper court and instead maintain custody for the duration of the prosecution.[47] In such a case, an order to the sheriff to relinquish the bond should suffice.

If you really want to get any unpaid amounts out of a defendant and you don't mind being paid pennies at a time over the course of years, you're in luck. For Texas Department of Criminal Justice (TDCJ) inmates, the Government Code authorizes withdrawals from inmate trust accounts (aka "commissary") for satisfaction of unpaid judgments.[48] This authorization is not limited to criminal fines and restitution but includes "any other court order, judgment, or writ."[49] The Office of Court Administration has sample Inmate Withdrawal Orders available online.[50]

Finally, if the defendant posted a personal bond, good luck with that. Personal bonds are frequently the result of a defendant too indigent to post any other type of bond. Even when not the result of indigence, locating assets subject to execution can be a Herculean undertaking that costs more in time and effort than will ever be recovered.

But wait, there's more!

So far, we've discussed only how to pursue forfeiture of the defendant's bond. However, his failure to appear probably constitutes the criminal offense of bail jumping. While related to the civil forfeiture proceeding, a bail jumping prosecution follows the same course as any other criminal case. We'll cover how to put together a bail jumping trial, including what we can use from the forfeiture proceeding, in a future article.

Until then, good luck recovering those personal bonds! ❇

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Endnotes

[1] Release on personal recognizance technically means release *without* a bond, whereas a personal bond *is* a bond, and some form of bond is almost always required for release in Texas.

[2] For purposes of this article, "bond" means any of the three types of bond unless otherwise specified.

[3] Tex. Code Crim. Proc. Art. 17.08.

[4] 648 S.W.2d 700 (Tex. Crim. App. 1983).

[5] Tex. Code Crim. Proc. Art. 22.01.

[6] Tex. Code Crim. Proc. Art. 22.02.

[7] *Aspilla v. State*, 952 S.W.2d 610 (Tex. App.–Houston [14th Dist.] 1997, no pet.).

[8] A judgment nisi is a conditional judgment that will become final if a specified condition is or is not met.

[9] Tex. Code Crim. Proc. Art. 22.02.

[10] For purposes of this article, we will use "defendant" only to refer to our original criminal defendant.

[11] If the county is regulated by a bail bond board; in counties without a board, the sheriff is responsible for verifying security.

[12] E.g., "Bob Bondsman d/b/a Fugitive's Choice Bail Bonds."

[13] E.g., "Never Showing Up Insurance by and through Bob Bondsman d/b/a Fugitive's Choice Bail Bonds."

[14] Tex. Atty. Gen. Op'n. LO-96-019.

[15] Tex. Code Crim. Proc. Art. 22.03.

[16] https://apps.tdi.state.tx.us/pcci/pcci_search.jsp.

[17] Tex. Code Crim. Proc. Art. 22.04.

[18] *Hubbard v. State*, 814 S.W.2d 402 (Tex. App.–Waco 1991, no pet.).

[19] Tex. Code Crim. Proc. Art. 22.05.

[20] Tex. Code Crim. Proc. Art.22.13(a)(1).

[21] *Balboa v. State*, 612 S.W.2d 553 (Tex.Crim.App. 1981).

[22] *Reyes v. State*, 31 S.W.3d 343 (Tex. App.–Corpus Christi 2000, no pet.).

[23] *Surety Ins. Co. v. State*, 500 S.W.2d 119 (Tex.Crim.App. 1973).

[24] Tex. Code Crim. Proc. Art. 22.13(a)(2).

[25] *Herndon v. State*, 505 S.W.2d 546 (Tex.Crim.App. 1974).

[26] Tex. Code Crim. Proc. Art. 22.13(a)(3).

[27] *Id*.

[28] *Hill v. State*, 955 S.W.2d 96 (Tex.Crim.App. 1997).

[29] *Allegheny Cas. Co. v. State*, 163 S.W.3d 220 (Tex. App.–El Paso 2005, no pet.)).

[30] Tex. Code Crim. Proc. Art. 22.13(a)(4).

[31] Tex. Gov't Code §24.012.

[32] Tex. Gov't Code §26.002.

[33] See generally Tex. Gov't Code §25.0016; the creating statute for some statutory county courts specify their terms.

[34] Tex. Code Crim. Proc. Art. 22.13(a)(5).

[35] *Benson v. State*, 476 S.W.3d 136 (Tex.App.–Austin 2015, pet ref'd).

[36] Tex. Code Crim. Proc. Art. 22.13(b).

[37] *Alvarez v. State*, 861 S.W.2d 878 (Tex.Crim.App. 1992).

[38] *Kubosh v. State*, 241 S.W.3d 60 (Tex.Crim.App. 2007).

[39] Tex. R. Evid. 101(e)(3)(C).

[40] Tex. Code Crim. Proc. Art. 22.14.

[41] Tex. Code Crim. Proc. Art. 17.08.

[42] *Moore v. State*, 828 S.W.2d 497 (Tex. App.–Dallas 1992, no pet.).

[43] Tex. Code Crim. Proc. Art. 22.13(b).

[44] Many insurance companies require their bondsmen to retain a percentage of each bond premium in a fund to cover these expenses.

[45] Tex. Occ. Code §1704.204(b).

[46] Tex. Code Crim. Proc. Art. 17.02.

[47] Tex. Att'y Gen. Op. C-740 (1966) also indicates that the sheriff may not be designated as the custodian to get around this situation.

[48] Tex. Gov't. Code §501.014.

[49] Tex. Gov't. Code §105.014(e)(6).

[50] http://www.txcourts.gov/rules-forms/forms.

Revised applications for Investigator Section scholarship and awards online

Updated applications for 2018's PCI certificates and 2019's Chuck Dennis Award, Oscar Sherrell Award, and Investigator Section scholarship are now posted online.

Changes have been made to all the applications so please use the new forms (on our website in this issue of the journal), and do not use any old forms you might have. Applications must be postmarked by the deadline date or they will not be accepted.

The Professional Criminal Investigator (PCI) is open to district, county, and criminal district attorney investigators with at least eight years of full-time employment in a prosecutor's office (if holding an Advanced Certificate with TCOLE) or five years of full-time employment (if holding a Masters Certificate with TCOLE).

The Chuck Dennis Investigator of the Year Award is given annually to that investigator who exemplifies the commitment of the law enforcement community to serving others, serving his office, and remaining active with TDCAA.

The Oscar Sherrell Service to TDCAA Award recognizes those enthusiastic investigators who excel in TDCAA work. This award may recognize a specific activity that has benefited or improved TDCAA, or it may recognize a body of work that has improved the service that TDCAA provides to the profession.

The TDCAA scholarship program was initiated in 2002 by the Investigator Section Board of Directors with the objective of encouraging our future through the support of our present. Two $1,000 scholarships are awarded each year, one at the Annual Update in September and one at Investigator School in February. Children under legal guardianship of a current TDCAA member, who are younger than 25 and currently enrolled in or accepted by an accredited college, university, or technical school in the U.S. as of the application deadline and with a cumulative high school or college GPA of at least 2.5 are eligible. Funding for these scholarships is currently provided through the sales of TDCAA merchandise and Board fundraisers made available at approved training conferences. ❇

Investigating claims of sexual harassment in the #MeToo era

A friend from college recently told me about an experience with her teenage daughter. They were walking together when a car drove by with 20-something-year-old men in it, and they called out to her daughter.

By Leslie W. Dippel
Director, Civil Litigation Division in the Travis County Attorney's Office

Her daughter yelled back at them and told them, in colorful words complete with gestures, that their comments were not appreciated.

My friend had mixed feelings. On one hand, she was not happy with her daughter's language. On the other hand, she was proud of her for standing up for herself. My friend reflected on her own childhood. She, and a lot of women her age, felt conditioned to ignore these types of comments for the sake of keeping peace, so many women handled such situations with silence. Fast-forward to the present, and her daughter's generation reacts to this behavior much differently. This generation is entering the workforce at a very interesting time when it comes to harassment.

Harassment is a specific form of gender discrimination, and claims of harassment permeate every industry, profession, and workplace. Employers should be listening. There has been much-needed awareness about harassment raised in the workplace following the news stories of famous people, including Harvey Weinstein, Matt Lauer, Kevin Spacey, and others. The issue has garnered so much national attention that it has its own hashtag, #MeToo.

Harassment had the EEOC's attention even before recent media focus. In June 2016, Victoria Lipnic, Acting Chair of the EEOC, co-authored a report from the EEOC Select Task Force on the Study of Harassment in the Workplace. In that report, she notes that 25 percent of women surveyed stated they had experienced sexual harassment in the workplace. Interestingly, when asked if they experienced specific behaviors that would constitute sexual harassment, that number rose to 40 percent. Depending on how the question was asked, that number rose as high as 75 percent.[1] Yet roughly three out of four individuals who have experienced harassment do not report it, even internally to a supervisor.[2]

Equal Employment Opportunity Commission (EEOC) statistics are not yet completed for 2018. While EEOC charges asserting sexual harassment have held relatively steady at approximately 7,000 per year,[3] it is easy to anticipate a sharp increase at the conclusion of this year. Employers have certainly paid attention to incidents in the news involving celebrities, and there has been an increase in workplace education and prevention programs. So, while the re-energized movement is still too new to have changed the law in this area, it is certainly responsible for a shift in public and employer perception, and it has caused many employers to review their own policies, practices, and cultures.

Title VII of the Civil Rights Act of 1964 prohibits an employer from refusing to hire, terminate, or otherwise discriminate against an individual based on race, color, religion, sex, or national origin.[4] Thirty years ago, the Supreme Court of the United States broadened the scope to include "sexual harassment so 'severe or pervasive' as to 'alter the conditions of [the victim's] employment and create an abusive working en-

vironment.'"[5] Although the law does not prohibit teasing, offhand comments, or isolated incidents, conduct can be actionable when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as being fired or demoted). For example, harassment can include unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature, including through electronic communications such as emails, texts, and social media posts. However, harassment does not have to be of a sexual nature to be actionable. It can also include offensive remarks about a person's gender or offensive jokes.

Two recent cases are worth noting:

In *Alamo Heights ISD v. Clark*,[6] the female plaintiff asserted that her female coworker made daily offensive comments to her, such as references to her breast size, "dimples" on her buttocks showing through her pants, and other vulgar comments about having sex. The San Antonio Court of Appeals found the harassment was gender-motivated because the majority of the comments referred to the plaintiff's body parts. The Texas Supreme Court reversed, though, holding that the conduct, "although rude, crass, and hostile," and "so offensive that it is easy to understand that a sense of decency initially inclines one to want to grant relief," was not actionable because it was not motivated by the plaintiff's gender.

The Court outlined three methods to prove that harassing conduct is because of gender in a same-sex harassment case:

1) the harassing conduct is motivated by sexual conduct,

2) the harassing conduct is motivated by a general hostility to women (or men) in the workplace; or

3) direct comparative evidence that the alleged harasser treats men and women differently.

In this same-sex harassment case, the Court reasoned that the plaintiff did not meet her burden because her coworker behaved similarly to men and women.

In *Davenport v. Edward D. Jones & Co.*,[7] a manager asked the plaintiff to date a client and send the client nude pictures of herself to obtain his business. The Fifth Circuit Court of Appeals held that a manager's request for the plaintiff to engage in sexual conduct with a customer, with the promise of "big bonuses," *could* form the basis of a quid pro quo harassment claim, but the plaintiff failed to prove she suffered an adverse employment action when she refused. She did not establish there were actual bonuses available that she did not receive.

With this context, it is easy to see how interpretation can mean everything. The legal limits should not be an employer's floor of appropriate behavior. While the law retains a fairly high burden to prove harassing conduct, employers may experience negative morale, negative publicity, retention issues, and a workforce that is distrustful their best interests are prioritized. This is in addition to time, expense, and other resources invested in defending a claim or lawsuit of this nature.

The law rightly provides an affirmative defense to employers when 1) they establish they exercised reasonable care to prevent and promptly correct sexually harassing behavior, and 2) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities.[8] Accordingly, an employer should respond immediately when it receives a complaint or observes offending behavior. This is especially true now, when the use of social media can significantly increase the speed with which an incident can occur and be disclosed.

Twenty-five percent of women surveyed stated they had experienced sexual harassment in the workplace. Interestingly, when asked if they experienced specific behaviors that would constitute sexual harassment, that number rose to 40 percent. Depending on how the question was asked, that number rose as high as 75 percent.

Best practices

Below are some best practices inspired, in part, by the EEOC Task Force Report that employers can use to set the tone of a harassment-free workplace:

Adopt and practice a strong anti-harassment policy. Many employers have not yet taken this step, and it is imperative. It is the first step in preventing harassment. The policy should be written, formalized, and published to all employees. Employers should review it periodically for revision. At a minimum, it should prohibit discrimination and harassment, contain a complaint procedure with multiple options for reporting, a commitment to investigate and correct violations, and a prohibition against retaliation. If you would like a sample to get started, please look for this article on the TDCAA website, where a sample has been uploaded.

Foster a harassment-free culture. Ensure your work environment is a culture where harassment is not tolerated. Have training meetings more often than upon initial hiring, hang signs, and send occasional emails that remind

employees you expect a positive working environment free from harassment. In short, keep the communication active that you expect civility in the workplace.

Educate and empower leadership. Employers are responsible for the action and non-action of the supervisors they employ. Invest in their training, and empower them with words and suggested actions for when they receive a report of harassment or observe potential harassing conduct. Employers cannot correct what they are not aware of, and it is front-line supervisors who will most likely be the information sources. They should have the responsibility and freedom to react and report up the chain of command for appropriate handling.

Employers cannot correct what they are not aware of, and it is front-line supervisors who will most likely be the information sources. They should have the responsibility and freedom to react and report up the chain of command for appropriate handling.

Promptly investigate the conduct. Even if you do not have an official complaint but someone has observed offending conduct, promptly investigate and take appropriate corrective action. There are many thoughts on selecting the appropriate investigator, and all have merit. Whomever an employer chooses to conduct an investigation must be trained in how to do so promptly and thoroughly. In the event of an EEOC charge, the investigation will be Exhibit A.

Prohibit retaliation. According to polls, a significant percentage of harassment complaints go unreported.[9] The No. 1 concern cited is the fear of retaliation. Title VII prohibits retaliation against employees who complain or participate in an investigation of harassment. To prove retaliation, the employee must show:

1) he or she engaged in protected activity;
2) he or she suffered an adverse employment action; and
3) a causal connection exists between the protected activity and the adverse employment action.[10]

Establishing an adverse employment action depends on whether the action would dissuade a reasonable employee from engaging in protected activity.[11] This area is an extremely dangerous one for employers because the law clearly provides that termination or demotion is enough to establish an adverse employment action, while merely giving someone the "cold shoulder" is not—and there is a large landscape in between. Employers should investigate and correct claims of retaliation in the same manner as an underlying claim of harassment, document that they have checked in with the complainant on several occasions, and document his or her response.

Conclusion

It is all employees' responsibility to ensure the workplace is free from harassment. That responsibility starts with how we treat one another, how supervisors react when they observe offending behavior, and how leadership responds when it is brought to their attention. My friend's daughter and her entire generation, male and female, are not going to accept anything less, and employers need to be prepared to respond accordingly. If an employer thinks it will not arise in your workplace, ask around: #YouToo. ❇

Endnotes

[1] www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf; see pg. 8-9.

[2] www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf; see pg. V.

[3] www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm.

[4] *Faragher v. City of Boca Raton*, 524 U.S. 775, 786 (1998).

[5] *Faragher*, 524 U.S. at 786, quoting *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986).

[6] 544 S.W.3d 755 (Tex. 2018).

[7] 891 F.3d 162, 165 (5th Cir. 2018).

[8] *Faragher*, 524 U.S. 775 at 807 (1998).

[9] https://abcnews.go.com/Politics/unwanted-sexual-advances-hollywood-weinstein-story-poll/story.

[10] *EEOC v. Emcare, Inc.*, 854 F.2d 678 (5th Cir. 2017).

[11] *McCullough v. Kirkman*, 212 F. App'x 281 (5th Cir. 2006).

How to take *Extreme Ownership*

There is no better path to success as a misdemeanor prosecutor than to take "extreme ownership" of every case, situation, or trial that comes your way.

By Courtney Floyd
Assistant Criminal District Attorney in Collin County

Fully owning absolutely everything in our sphere of responsibility (including any failure, miscommunication, or shortcoming) is a mentality that is vital to good leadership—leadership that yields results.

This is the crux of the argument made in Jocko Willink and Leif Babin's book *Extreme Ownership: How Navy SEALS Lead and Win*, in which those two experienced Navy SEAL combat leaders lay out 12 leadership principles that are both applicable and essential to sustained success as a misdemeanor prosecutor.

Willink and Babin led groups of U.S. Navy SEALS in their historic 2006 combat deployment to Al Ramadi—a mission that established security in the most dangerous city in Iraq and ultimately paved the way for the United States to succeed. They learned many of the principles in *Extreme Ownership* in the middle of highly volatile situations in which good leadership quite literally meant the difference between life and death.

The principles at play in the battlefield directly translate to a courtroom or prosecutor's office. As co-author Leif Babin puts it, "Combat leadership requires getting a diverse team of people in various groups to execute highly complex missions in order to achieve strategic goals—something that directly correlates with any company or organization." As a misdemeanor prosecutor, good leadership can mean the difference between winning and losing; getting the best outcome for a plea or getting a mediocre outcome; fearlessly seeing that justice is done or crumpling under pressure. And as we all know, sometimes what happens in the courtroom can have life-or-death consequences.

Misdemeanor prosecutors may not believe we can be leaders. If you're not a chief or a supervisor, how can you be expected to lead? I challenge you to broaden your idea of leadership. Start by practicing just one principle of "extreme ownership." While all principles in the book are important (there are no bad teams, only bad leaders, for example, and leaders must be true believers in the mission), one of the 12 stood out as particularly applicable to misdemeanor prosecutors: leading up and down the chain of command.

This can be summed up in one directive: Own everything in your world. I'll explain in a couple of examples.

1) Lead up the chain of command. Let's say your supervisor criticizes a decision you made and you complain that he "just doesn't understand." Most of us would just roll our eyes and stop there. But if you want to be an effective leader, you need to acknowledge that it was your responsibility to keep the boss in the loop regarding the circumstances of your decision and the thought process behind it.

In this situation, your first thought should be, "How could I have better communicated, clarified, or educated?" instead of blaming your boss, judge, or court chief for his supposed ignorance. Don't fall into the trap of thinking of them as the infamous *they*—that only leads to discontentment and subordination. We're a team, and we must treat our teammates with respect. Have enough respect for your supervisor to push situational awareness up the chain of command. Make sure those who have authority over you understand the strategic impact of your decisions. Use your influence, experience, knowledge, and communication skills while maintaining the highest professionalism.

2) Lead down the chain of command. Sure, you may not have someone who directly reports to you, but apply this principle more broadly to

Extreme Ownership: How Navy SEALS Lead and Win by Jocko Willink and Leif Babin, St. Martin's Press, 2015

your other business relationships. For example, it's tempting to blame an officer if he testifies poorly and it costs you a trial. It's easy to write him off and move on, but a good leader doesn't always do what's easy.

If you're upset that the officer did not testify well, consider how you could've communicated your expectations more clearly and why you have those expectations. Did you explain to the officer his importance to the success of the case or how his role contributes to the bigger picture? What about why you wanted to ask certain questions on the stand but not others? Could you have called him ahead of time or gone down to the station to meet with him personally? If you make yourself available and communicate the bigger picture early on, he will likely take more time to review his report and talk through any questions or concerns with you ahead of time. It is your responsibility to open and maintain the lines of communication while clearly and concisely explaining *what* your mission is and *why* it is important. The same principle applies to other witnesses, investigators, court partners, and support staff.

And that's just one of the leadership principles we should practice. It's astonishing to see how nearly all of our problems boil down to lack of good leadership. The solution is simple but not intuitive or easy, and it requires work and intention. As misdemeanor prosecutors, we should take extreme ownership of everything in our world, which can launch us from good employees to great leaders. ❇

TDCAA's upcoming seminar schedule

Elected Prosecutor Conference, November 28–30, at the Embassy Suites in San Marcos. Room rates are $139 plus tax and include hot breakfast and daily happy hour. Call 800/362-2779 for reservations.
Jury Selection in Impaired Driving Prosecutions, December 7, in Richmond, Rockwall, and San Antonio. See www.tdcaa.com for exact locations.
Prosecutor Trial Skills Course, January 13–18, 2019, at the Omni Southpark Hotel in Austin. Room rates are $119 plus tax; this rate is good until December 24 or until sold out. Call 512/383-2622 for reservations, and mention TDCAA for the group rate.
Investigator School, February 11–14, 2019, at the Omni Colonnade in San Antonio.
Train The Trainer, March 5–8, 2019, at the Inn on Barons Creek in Fredericksburg.
Domestic Violence, April 9–12, 2019, at the Sheraton Hotel in Georgetown.
Civil Law Seminar, May 8–10, 2019, at the Omni Colonnade in San Antonio.
Homicide, June 12–14, 2019, at the Embassy Suites Hotel & Conference Center in San Marcos.
Prosecutor Trial Skills Course, July 14–19, 2019, at the Omni Southpark Hotel in Austin.
Advanced Trial Advocacy Course, July 29–August 2, 2019, at Baylor Law School in Waco.
Annual Criminal & Civil Law Update, September 17–20, 2019, at the American Bank Center in Corpus Christi. Host hotels are the Omni Bayfront, Emerald Beach, and Radisson.
Key Personnel & Victim Assistance Coordinator Seminar, November 6–8, 2019, at the Embassy Suites Hotel & Conference Center in San Marcos.
Elected Prosecutor Conference, December 4–6, 2019, at the Lakeway Resort & Spa in Austin. ❇

A prosecutor's guide to the zombie apocalypse

(Or, how to survive when everybody in your office quits.)

By Zack Wavrusa
Assistant County & District Attorney in Rusk County

Rusk County is generally a pretty predictable place. Our jurisdiction is incredibly rural, with a population that's been a relatively flat 50,000 people since 1940. The office consists of the elected County and District Attorney, one felony assistant, two misdemeanor assistants, two clerks, a victim assistance coordinator (VAC), and an investigator. On top of every criminal case in the county, we also handle Child Protective Services (CPS) cases and a sizeable chunk of the county's day-to-day civil law issues. Our office is small, and while we all have a wide variety of responsibilities, each of us still maintains a relatively well-defined role.

Up until fairly recently, our office, while far from perfect, functioned pretty well. Everybody understood his or her job responsibilities, and group success was prioritized over individual achievement. The whole staff got along well enough, even in those moments where we didn't particularly like each other. We had been together for a solid three years and could have continued to get the job done for many more—until, within about two weeks of each other, both misdemeanor assistants unexpectedly resigned.

Add to it that this massive turnover happened just before the birth of my daughter, Libby.[1] Our office had a plan to deal with my absence for a couple of weeks, but losing both of the other ADAs in short succession threw all of that out the window. The plan had been for me to take three weeks of vacation to be with my wife and our newborn. While I was out, the other two ADAs would divvy up my day-to-day responsibilities while our elected handled trial docket and the wave of defense attorneys that accompanied it. We were able to replace one of the two assistants before Libby's arrival, but we didn't have quite enough time to truly get the new hire up to speed. In hindsight, things probably went about as well as could be expected, but in the moment, it certainly felt like we would be overrun at any moment.

Suddenly, the stability our office had enjoyed for so long was gone. My elected, Mike Jimerson, and I could have been the protagonists of any number of zombie apocalypse movies. You know the script. One moment, the world is perfectly normal. Then something happens: The protagonist is in a car accident, gets shot, or suffers some other malady, and he is sent to the hospital and placed in a medically induced coma. He wakes up days or weeks later, only to learn that everything he knew before has been turned upside down because of a zombie invasion. Now he must learn how to survive in a strange new world where dear Aunt Doris has risen from the dead and wants to eat his brain.

Mass turnover is exactly like that. Well, not *exactly*, but it's surprisingly similar. When a sizeable percentage of a prosecutor's office suddenly leaves, the survivors must band together and learn to thrive in a work environment that bears only a passing resemblance to the one that existed before.[2] That's the situation Mike and I found ourselves in this past summer when we were faced with the arduous task of covering the dockets for Rusk County's various criminal courts plus hiring and training two new misdemeanor assistants. To say it was a learning experience would be putting it lightly. If we have to deal with mass turnover again,[3] our implementation of the following "survival tips" will insure that our experience is a little less like *Night of the Living Dead* and a little more like *Zombieland*. I share them with readers with the same hope.

If we have to deal with mass turnover again, our implementation of the following "survival tips" will insure that our experience is a little less like Night of the Living Dead *and a little more like* Zombieland.

Preparing for doomsday

Dealing with massive turnover is not unlike dealing with any other disaster. If you wait until the event is upon you, you will most certainly fail. Success requires a little foresight, a lot of planning, and countless cases of Spam and potable water.

The most important thing you can do to prepare for mass turnover is cross-train employees in the office. Cross-trained employees can step in at any time and perform the functions of multiple jobs. The smaller the office, the more important such training will be. Failure to properly cross-train between the attorneys in an office and between the attorneys and the various other staff members can be disastrous when you lose multiple employees in a short period of time. The consequences can be felt long after the departing employees have been replaced, especially in a small office.

We are still dealing with problems from our lack of cross-training today, and we have been fully staffed for three months. I'm the longest tenured employee in the Rusk County District Attorney's Office—I have been here since I was licensed in May 2011—and to this point I've been fortunate enough to have never been stuck doing the annual asset forfeiture report required by Article 59 of the Texas Code of Criminal Procedure. I considered myself lucky to have avoided that headache—that is, until a couple of weeks ago when one of our new hires asked me how to get started on it. All I could do was stare at her blankly and mumble something about my stapler.[4] I should have been available to walk her through assembling the report, but our lack of cross-training reared its ugly head, and I had to tell her to look through the code and see what information the Attorney General's office had available.

Successful cross-training is more than simply knowing the responsibilities of the other members of your office. The goals for a cross-trained employee should be to 1) understand the responsibilities of the position for which they are training, 2) understand how each specific job function is performed, 3) understand *why* that particular step or process is necessary, and 4) be able to perform the job responsibilities competently with minimal supervision.

What do you even *do* here?

Keeping up with the job responsibilities is easier said than done. There isn't an attorney reading this who doesn't have a full plate. When it takes every bit of your eight- (or 10- or 12-) hour day, just to get your own job done, it can be really hard to take an earnest interest in what anyone else is doing. But understanding just how everybody else in your office is spending his or her days is essential, and time must be set aside to learn. Nobody wants to be trapped in a shopping mall, in need of a doctor but surrounded by zombies, and have to settle for a veterinarian.

When it comes to learning someone else's job, no one is going to be able to explain it better than the person who is already doing it. I strongly recommend beginning the cross-training process by having each employee write a comprehensive description of his or her responsibilities. I'm not talking about the paragraph or two that you would use when posting about a job vacancy. Each employee needs to draft a description of his job responsibilities with a level of detail that rivals that of a moody teenager's diary.

I recommend that the employee start the description by thinking about his job responsibilities on a month-to-month, then week-to-week, and finally day-to-day basis. By thinking on multiple levels, each employee is more likely to think about (and subsequently include descriptions of) his less-common job responsibilities. Here is a very abbreviated look at the first part of my job description.

Month to Month

January: Set CLE calendar for attorneys
March: Review and revise Citizens Prosecutor Academy (CPA) syllabus
May:
- Publicize CPA and get applications out (Week 1)
- CPA applications due (Week 4)

June: CPA begins (it's usually every Thursday for six weeks)
October: National Night Out
November:
- Sign up all employees for open enrollment
- Get with district court coordinator about next year's trial calendar

Week to Week

Week 1 of each month
- grand jury
- trial docket

Week 2 of each month
- subpoena cases for trial
- prepare witnesses and victims to testify
- arraignment docket

Week 3 of each month
- **Monday**: voir dire (be prepared to select two juries back-to-back)
- **Tuesday**: evidence begins
- **Thursday**: begin second jury trial if possible

Week 4 of each month
- Review cases set for grand jury
- Work on appeals (if any)
- Ride along with local LE if things slow down enough

Day to Day

First thing: Review court calendar for unexpected changes
Morning: Respond to emails and voicemails from night before
Afternoon:
- Touch base with any witnesses needed for tomorrow
- Return any casefiles left in my office back to file room

Breaking down my job responsibilities in this fashion lets anybody who might need to perform them know what they need to do, depending on when and how long they need to cover for me. Let's say I unexpectedly miss the whole month of May next year, and one of the misdemeanor attorneys is tasked with covering for me. Because of the month-to-month description of my job responsibilities, my coworker will know that, in addition to simply managing the trial docket and court calendar, he will need to get the ball rolling on our Citizens Prosecutor Academy.

How am I supposed to do that?

Knowing what needs to be done is great. That knowledge is ultimately useless, however, if you don't know how to get the job done. Some of what we do in our day-to-day jobs is so routine that it's almost going to be self-explanatory. Someone filling in for me or, heaven forbid, replacing me doesn't need step-by-step instructions for "responding to the previous night's voicemails and emails." But he or she will probably need instruction on assembling the asset forfeiture report for the county commissioners court.[5]

The most effective cross-trainings will include the entire office (or pretty close). Don't limit these cross trainings as "attorney only" or "support staff only," especially in a small office, because every member of the office is a partner in achieving justice in the communities we serve. The more informed we are about the workings of the office, the better we can serve those communities.

For example, our VAC is never going to walk into the 4th Judicial District Court and prosecute a Motion to Revoke Community Supervision. But the fact that she has received some training on the topic means that when I find myself in a time crunch, I can count on her to review the allegations in the motion to revoke and organize the necessary witnesses for me. Armed with knowledge that extends beyond her own duties, our VAC is also hugely important in getting our new attorneys up to speed. Because of the cross-training she has received, she can help those attorneys get through the situations that law school doesn't quite prepare us for.

The person conducting the cross-training should be familiar with the ins and outs of the topic, and the training itself should involve more than just lecturing your fellow employees for an hour. As you would in voir dire, be as conversational as possible, and don't simply read from notes or a textbook. For a complex topic, don't hesitate to utilize PowerPoint, and don't be afraid to create graphs or charts within PowerPoint if they would drive home whatever you're teaching. Handouts, "cheat sheets," or sample documents go a long way toward improving memory retention, as do appropriate interactive elements. For some topics that require finesse, such as dealing with a difficult victim or plea negotiations with a *pro se* defendant, you might use role-playing scenarios. Other times, try fun quizzes or games to reinforce the lessons. For example, Tiana Sanford, an ADA in the Montgomery County District Attorney's Office, hosted a game of "Jeopardy!" at TDCAA's Civil Law Seminar earlier this year; it was absolutely incredible at keeping the audience's attention and driving home the points she

Don't limit cross trainings as "attorney only" or "support staff only," especially in a small office, because every member of the office is a partner in achieving justice in the communities we serve.

was making. Anything that can make learning easier and more memorable is worth the work it takes.

Why are we even here?

When cross-training an employee on a job responsibility that includes interacting with one of these groups, it's important to explain not just what to do but also *why*. Teaching employees the why behind everything they do will help them avoid making an unnecessary mistake (or unnecessary enemy) when and if they attempt to improve a process—which is part of our natural bent as attorneys. Undeserved self-confidence is a common trait in our profession. Sometimes this trait can be an asset, especially when fighting for justice in a courtroom, but it can be a hindrance just as easily, especially when an attorney, upon undergoing some cross-training, thinks of some ways to change and improve the way things are done around the office.

Teaching employees the why behind everything they do will help them avoid making an unnecessary mistake (or unnecessary enemy) when and if they attempt to improve a process–which is part of our natural bent as attorneys.

This mindset can really be problematic because ignorance and inexperience, combined with our natural desire to improve things, can lead to mistakes of varying proportions, especially when people outside the office are involved. Judges, clerks, and court coordinators are creatures of habit and, in my experience, they are prone to completely shutting down when confronted with something new or different. Law enforcement officers, too, have protocol-driven minds, and a change in policy or procedure, especially one that makes their jobs more difficult, can result in unwanted backlash. Jurors, crime victims, and other community members typically have little to no legal experience and it's likely that your office has clear protocols (that can't or shouldn't be changed) for interacting with them. "Don't ever take a fence down until you know the reason why it was put up," as President John F. Kennedy once wrote. He was quoting G.K. Chesteron, the famous Catholic thinker and theologian, who expanded on the idea: "If you don't see the use of [a fence or gate across a road], I certainly won't let you clear it away. Go away and think. Then, when you can come back and tell me that you do see the use of it, I may allow you to destroy it."[6]

Boldly go where plenty of people have gone before

You can train employees until you are blue in the face and not really know how much of the message has sunk in. Employees are cross-trained so that when you lose an employee to private practice, another prosecutor's office, or retirement, you have the next person (or at least *a* person) ready to step up and fill those shoes. You don't want to wait until then, your moment of need, to see if cross-training worked or not. You need to assess your employee's ability to handle the new job responsibilities long before you actually need them to step up.

Depending on the task, you might want to toss them into the kitchen and see if they can handle the heat. Obviously, this approach should be used only where you can afford a mistake or where you have the time to completely redo something. Despite that, having the employee perform the task without assistance is probably the truest test of whether she has actually mastered the skill. Furthermore, the first-hand experience of making mistakes is the best teacher I have ever had.

If this is the approach you go with, it's important to extensively review the employee's actions afterward. Remember, that employee is being trained so that, when needed, she can step in and competently perform those job responsibilities with minimal supervision, so a quick "Great job! Here are a couple of things to work on"-type critique might be doing your office (and that employee) a disservice. Instead, be thorough but fair in your evaluation. Clearly identify the employee's mistakes, and work with her to correct them. I suggest going out of your way to make sure she knows that evaluating and critiquing her work is part of a development process, not a disciplinary one.

For more serious responsibilities where accuracy or efficiency is critical, I recommend letting the employee shadow or second-chair another staffer who has mastered the task. Throughout the process, encourage the employee to ask questions. If possible, the trainer should offer commentary and ask questions to gauge how ready the employee is to handle the task on her own. Once the employee is ready to take a shot at tackling the task solo, it will once again be time for a thorough critique so that she can learn in preparation for the day when she might be thrust into the spotlight to handle it all by herself.

Hiring replacements

Say you've cross-trained everyone in the office to the best of your ability, and now any given employee's absence, expected or otherwise, will not throw the entire office into turmoil—though inevitably, the work day is going to get a little bit longer and a lot more hectic as survivors adjust to the new world order. But you've got it covered.

Now to bring in replacements for the open positions.

First and foremost, our office learned how important it is to get the ball rolling on replacements as soon as practicable. Because our office is so small and the jurisdiction so rural, it was important we hire people who could handle the diversity of job responsibilities and whose personalities would fit in with our tightknit office. Initially, we took a narrow approach and posted the job only on our county website and Facebook page, the hope being that by keeping the search local, we would attract local attorneys. This did not happen. We had a couple of strong candidates from nearby offices submit resumes, but the salary ultimately turned them off. It wasn't until we cast a bigger net that we found the right person for the job and, if we had it to over again, we would cast the widest net right from the start. We found success in posting to TDCAA's job bank (https://www.tdcaa.com/job_bank) and with the career services departments of Texas's many law schools.

You will also want to notify local clerks, courts, and law enforcement about the former employees' resignations. This is a critical step, especially with so much inter-office communication taking place via email. We didn't realize it at the time, but for a short while, several emails from local law enforcement were being sent to the still-active but unmonitored email accounts of our former ADAs. Luckily, none of the emails were critical, but the potential for disaster was definitely there. With so many defense motions being e-filed now and with the mandatory e-file date rapidly approaching, you will need to ensure that service of electronically filed documents is sent to a current employee.

After you get the job description posted and have notified interested parties of the old employee's resignation, sit back and get ready for all the dead bodies to float to the surface. In the almost eight years that I have worked here, I have witnessed the departure of five ADAs, one investigator, one VAC, and two clerks. The whole office (save for the elected) has turned over, and each and every time someone leaves, the people left behind have had to deal with some degree of mess. With mass turnover, the process is even worse. Be on the lookout for the "bodies," as they are definitely something best dealt with before they have the chance to rise up and come chomping after you. Keep your eyes open for: 1) crime victims who were allowed to develop unrealistic expectations, 2) courthouse staff or law enforcement whose lives were easier because the departed employee was going above and beyond (or breaking office policy) in a way that is no longer possible, 3) a pattern of bad plea offers, and 4) good old-fashioned incomplete work. These are nearly unavoidable, so be on the lookout for them.

A brand-new day

The last of humanity is never going to triumph over the zombie hordes of the future without a solid plan in place beforehand, and a prosecutor's office is never going to make it through sudden, mass exodus without a similarly solid plan. Dealing with a big staffing change in your office is never going to be fun or easy, but the unenviable task of being understaffed and overworked is always just a couple of resignation letters away, so keep your machete sharp and your ammo bag full. ❇

Employees are cross-trained so that when you lose an employee to private practice, another prosecutor's office, or retirement, you have the next person (or at least a person) ready to step up and fill those shoes.

Endnotes

[1] 2048's State Bar of Texas Criminal Justice Section Prosecutor of the Year.

[2] If you are imagining a hybrid of "The Walking Dead" and "Better Call Saul," where Andrew Lincoln and Bob Odenkirk have their morality tested as they partner in a post-apocalyptic law office, please email me. We could absolutely write the pilot episode together.

[3] Don't even think about it, Fannie Northcutt and Todd Smith.

[4] It's a red Swingline. I realize this reference doesn't really fit with the whole zombie apocalypse theme, but I don't care. When *you* write the articles, you can choose the random pop culture references.

Continued in the lavender box on page 33

Resolving Interference with Child Custody (ICC) cases

This summer, I attended a meeting regarding Penal Code §25.03 (Interference with Child Custody) in which TDCAA Executive Director Rob Kepple, representatives of several prosecutors' and legislators' offices, and a number of aggrieved parents who had been deprived of seeing their children for long periods of time were in attendance.

By David Willborn
County & District Attorney in Guadalupe County

Many of these parents' stories were extreme, and all were heart-wrenching. Although the vast majority of child custody disputes are naturally resolved in the family courts, we heard about a number of situations that seemed extraordinary and reasonably called for some attention by law enforcement. Once law enforcement gets involved, you will at some point be involved as well.

During the meeting, representatives from different prosecutors' offices discussed various strategies for successful resolution to these types of cases. The exchange of ideas that day led to my writing this article, and we in Guadalupe County hope that our experience will aid in reaching a positive resolution in cases that come before us.

Our method of dealing with potential ICC cases stems from our belief that justice does not require us to make felons out of co-parents who are having a temporary, non-violent dispute regarding children. It is often difficult for us to square the punishment level of an ICC case against other cases with more egregious facts but the same (or lower) punishment range. Our primary goal is to be sure that children get to see and interact with both parents in every situation where that is appropriate; it is the right thing to do and is proven to be the healthiest mode of living for children. With that said, we have been incredibly successful in resolving these cases in Guadalupe County with minimal judicial intervention. The following is a summary of how we handle them.

In Guadalupe County, all ICC cases originate from law enforcement agencies, as we do not accept direct filings in our office. While not a hard-and-fast rule, we ask that law enforcement not forward a case to us until more than one complaint is made. The "one-time" cases tend to come in sporadically (usually around holidays, the beginning and end of summer, or spring break) so, of the many reports that are made in our county, only a couple dozen require prosecutorial review annually.

As soon as we get a case from an agency, a prosecutor reviews it to determine if the person is actually in violation of a valid court order or decree. We require law enforcement to include the court order that was valid at the time of the incident with the case submission. If it is clear that a violation has taken place, we make telephone contact with the complainant (usually the noncustodial parent) to determine whether the incident is an ongoing problem or whether it was a temporary flare-up that has resolved itself. If it seems to us that the situation is a flare-up, we decline the case, send it back to the agency with a request that they retain the records of the incident, and ask the agency to immediately return it to us if another incident occurs within a calendar year.

If, however, the problem is regular and/or ongoing, we send a target letter to the parent who is in violation, informing him or her how s/he is violating the order. In that letter, we caution that, if s/he continues to violate the order, we will proceed with an ICC case. We include a verbatim copy of the relevant statute so that the violator knows precisely what conduct is prohibited and what the consequences of such conduct may be. A copy of that letter is also sent to the complainant and to the originating law enforcement agency, and we inform both that they should immediately contact our office if another offense takes place so that we can move forward with prosecution. Additionally, if the civil case between the parents is currently pending, we don't necessarily decline to prosecute the case as a matter of course. We will generally attempt to contact the attorney representing the violator to inform him or her and help straighten things out. It is relevant to note that since the inception of this policy, 85 to 90 percent of all ICC cases resolve either with the target letter or our contacting the civil attorney.

If these steps do not resolve the case, we proceed as if it were a normal prosecution, but with the overarching goal of reuniting the aggrieved parent with the child. We implement alternate solutions, such as informal deferred prosecution agreements, with the input and assistance of defense counsel to align everyone's interests and to bring the violator back into compliance. This almost always works, and in the two years since the inception of this policy, we have not had to set an ICC case for trial.

Of course, there may be other factors that will impact the success of such a program in another county. Guadalupe has a population of about 150,000. This method may be too cumbersome for smaller offices and too specialized for large ones. Additionally, community standards may be different in other locales and may bear heavily on how a case should be handled.

As in every instance where a child is involved, we try use our best judgment in doing what is in the child's best interest. It is our sincere hope that the methods that have been successful for us in Guadalupe County may be of service to other prosecutors in your continuing efforts to resolve these challenging cases. ❇

[5] One of our former assistants (let's call him Modesto) had been tasked with this particular responsibility for the past several years. Because we are friends and he doesn't work here anymore, I feel comfortable blaming him for my initial lack of knowledge on the subject.

[6] Chesteron, G.K., *The Thing: Why I Am a Catholic*; Dodd, Mead publishers; 1929, quoted at https://www.chesterton.org/taking-a-fence-down/.

A week in the life of an SPU prosecutor

So much of my life is dictated by tractors and tractor trailers.

By Jon English
Prosecutor with the Special Prosecution Unit (SPU)

That is to say, so much of my work commute depends on how many tractors will be driving down the shoulder of the single-lane, farm-to-market roads I have to take through rural Texas to get to the tiny courthouses in the tiny counties in which I prosecute.

On a good day, I may lose only 20 minutes to the 35-mph traffic jam caused by a John Deere combine. Behind the combine, there are inevitably another three 18-wheelers. And behind the 18-wheelers, there are another half-dozen pickup trucks looking for their chance to pass. But that chance won't come for miles. And we won't go a mile for another minute or so. No sir, we're all in this together now, moseying along in the early morning fog, squinting at the new day's sun as we ride eastbound, slowly sipping coffee and passing the time counting the gnarled, old barbed-wire fence posts that line the highway.

If you're a rural prosecutor, this is an everyday occurrence. Heck, if you're a rural prosecutor, you may even be *driving* the combine as part of your official duties. Except here's the catch: I don't live in a rural county. I live in suburban Austin, so I'm no stranger to traffic jams—but the kind I encounter day to day are as part of my duties as a prosecutor who handles crimes that occur in prison.

Welcome to life in the Special Prosecution Unit.

What is the SPU?

In a nutshell, we are the attorneys who prosecute crimes committed on property owned or operated by the Texas Department of Criminal Justice (TDCJ) or the Texas Juvenile Justice Department (TJJD), and all of the civil commitment cases involving sex offenders throughout the state.

It's equally important to distinguish who we are not. We are not special prosecutors employed by the TDCJ, and we are not affiliated with TDCJ. We are not special prosecutors employed by the Attorney General's Office, and we are not employed by the state. And you never, ever pronounce our acronym as "spew." It's S-P-U. We can call ourselves "spew" if we want to, but other people can't.

We are Walker County employees, and we are funded by a grant from the governor's office. For those of you who are now googling "Walker County," that's where Huntsville is. And as you probably already know, Huntsville is where TDCJ is headquartered. The SPU is also headquartered in Huntsville. And there are a good number of prison units in Huntsville itself—six to be exact. But the other 118 TDCJ facilities (and five juvenile units) are spread out all over the state, so the SPU has seven satellite offices to put those facilities within a realistic travelling distance for our 11 prosecutors, who are also spread out around the state.

When you begin constructing a facility to house really dangerous individuals, you're naturally going to put it someplace relatively rural and isolated (although sometimes the surrounding communities can become larger and more urban over time). Crimes that are committed in these facilities fall under the jurisdiction of the elected prosecutors in which the prisons are physically located.

There is no specific statute that gives the SPU jurisdiction over prison crimes, so how did we get to be responsible for these cases? To make a long story short, in 1984, all the elected prosecutors from these prison-populated jurisdictions got together to figure out how to deal with the extra burdens these unique crimes from a unique population were putting on the resources of their small offices. The solution was to create the SPU: attorneys travelling to counties in which these

prisons were located, acting as special prosecutors serving at the pleasure of each county's elected DA, and working solely on these specific crimes. That plan was enacted, and those elected prosecutors now make up the board that oversees our operations. The local prosecutors in these counties are now freed up to focus on crimes that affect their "free world" community more directly.

Now you know why my dockets require commutes that range between 90 minutes and five hours, and why so many of those miles are spent idling behind curiously large vehicles that are painted green. I'm one of our satellite prosecutors, based right outside of Austin. I cover 13 different units spread out across nine counties, from Falls County (just east of Waco), as far west as Medina County (just outside of San Antonio), on down to Hidalgo County (literally on the southern border with Mexico).

As a criminal prosecutor with the SPU, I split time between adult criminal cases and juvenile criminal cases, as do several of our other criminal prosecutors. Our civil commitment attorneys don't do criminal cases, and our criminal attorneys don't do civil commitments—the practices are just too specialized—so this article is about my experiences with our criminal workload. But I would be remiss if I didn't mention that our civil division, collectively, was named the Lone Star Prosecutors of the Year at TDCAA's 2017 Annual conference for the incredible work they do every day, shielding the public from the worst-of-the-worst sex offenders who are no longer incarcerated.[1]

A week in the life

It's almost impossible to capture anything that can be considered "typical" when it comes to being an SPU prosecutor because we each prosecute in so many different counties with so many different legal cultures. As a result, we each end up functioning more or less like our own little mini-prosecutor offices, linked by the same job description. With that caveat in mind, the following is my attempt to give you some insight into what my own experience as an SPU prosecutor is like in a typical week—even though there's no such thing.

Monday

I'm supposed to try a case today in Bee County for an offender caught with a small amount of dope who just absolutely refused to plead to a two-year offer, even though he was looking at a 25-year minimum if convicted. The defendant was originally represented by State Counsel for Offenders (SCFO), but he fired that lawyer and moved on to what we'd call a "free-world" defense attorney.

If the SPU is the Justice League, SCFO (which you can, and should, pronounce SKO-fo) is the Legion of Doom. Not because they are evil supervillains who are bent on world domination, but because they are the publicly compensated defense attorneys for evil supervillains who are bent on world domination. They are also TDCJ employees, a division that exists to make sure that offenders have competent legal representation in criminal cases. The main thing that makes working with SCFO easy is that its attorneys know the criminal justice system as well as we do. They have experience representing people who are currently incarcerated, they know who the OIG is (Office of the Inspector General—more on that in a bit) and how it operates, how to evaluate prison cases, etc.

Things often hit a snag when a "free-world" attorney gets thrown into the mix. This happens when an inmate decides to fire SCFO or when a case involves a defendant who wasn't incarcerated (i.e., a TDCJ staff member or someone who was visiting a prison). Also, SCFO does not represent any offenders who have been discharged or paroled since the offense occurred. One of the trickiest things to relate to "free world" defense attorneys is this State-friendly statute: Article 42.08(b) of the Code of Criminal Procedure, which says that any crime committed by an inmate will be stacked on top of that inmate's current sentence. You read that right. All prison crimes are served consecutively to the sentence the inmate is currently serving.

It's also worth noting at this point that essentially every crime committed in prison is a felony. For example, possession of *any* amount of a controlled substance, even if it's not a usable amount, is a third-degree felony.[2] This includes visitors who come onto TDCJ property with drugs in their car that they weren't planning on smuggling. Sometimes a visitor just didn't take seriously the signs they pass saying their car is subject to search when they enter the TDCJ parking lot—without a warrant or probable cause for a search—until they're looking at a third-degree felony.

If the SPU is the Justice League, SCFO (which you can, and should, pronounce SKO-fo) is the Legion of Doom. Not because they are evil supervillains who are bent on world domination, but because they are the publicly compensated defense attorneys for evil supervillains who are bent on world domination.

For most prosecutors, telling someone who was caught with a tiny amount of drugs that they're looking at prison time is going to induce a histrionic fit from the defense, because prison time is the absolute worst-case scenario. However, when you've already been locked up at least once before, you've become accustomed to the system.

All of these nuances can make plea-bargain negotiations very complicated. Plea bargains are different for people who are already serving prison time. For most prosecutors, telling someone who was caught with a tiny amount of drugs that they're looking at prison time is going to induce a histrionic fit from the defense, because prison time is the absolute worst-case scenario. However, when you've already been locked up at least once before, you've become accustomed to the system. You've become familiar with things like parole, good time, and mandatory release. And most importantly, all prison inmates have at least one enhancement paragraph in their indictments. Our prosecutors have a lot of leverage from the beginning of a case because of that reality.

On the other hand, because so many offenders are already serving lengthy prison sentences, they often couldn't care less about tacking another five to 10 years onto that sentence. And even more often, the thrill of being out of your cell for a week or two is a big incentive for them to reject pleas and push cases to trial. I've found offenders seem to actually enjoy trial because it's just something different than their regular, everyday life. And I have to say, I kind of feel the same way sometimes.

When I wake up Monday morning, the morning of trial, I have an email from the defense attorney saying he looked at the discovery for the first time the night before (I am not making that up) and he realized he could not open an audio file on his computer that he now believes is probably essential to the case. He has filed a continuance. This is bad because one of our essential witnesses, a correctional officer, is going into basic training on Tuesday—he is literally shipping out the next day to California, and we can't do anything to stop him or get him back. Knowing that the judge is going to grant the continuance despite the situation being 100 percent the defense attorney's fault, we have to plead the case.

Tuesday

Now that I don't have trial anymore, I can pack up and make the drive from Beeville to Hondo to present a chunk of cases in that county to the grand jury. I have 14 cases on my list (compared to almost 60 the prosecutors in Hondo have to handle themselves that day). They do their best to work me in, and we all complete our work just after 5 p.m. My cases run the gamut from drugs smuggled in by visitors to alleged sexual assaults.

Those cases with a small amount of drugs or contraband are by far our most common. Contraband also includes cell phones and cell phone components, which, as Jimmy McGill advises, "can be hidden in any number of places."[3] I can count on one hand the number of cell-phone cases I've had in the units I prosecute, whereas colleagues of mine have prosecuted hundreds over the same time period. It just goes to show that every prison unit is its own universe. Crime in these units vary widely.

TDCJ contraband bust of assorted cell phone components and drugs.

Harassment of a Public Servant[4] is another popular one. These come in two general types: spitting on a correctional officer and "chunking" on an officer. Chunking, if you must know, sometimes means throwing whole feces at a correctional officer, but most often it means putting urine, feces, or both in a water bottle, mixing it up, luring an officer to the meal slot or mesh-screen of your prison cell, and squirting it all over the officer.

We also have Deadly Weapon in a Penal Institution.[5] As you might imagine, many of the people who are currently in prison were accustomed to keeping themselves armed in the free world, and they darn sure are going to keep themselves armed in prison. As one offender told me (and on the stand during cross examination at that): "I always carry a shank on me." Weapons in prison come in two general varieties: Pointy Things and Things You Can Put in a Sock and Swing Around. Pointy Things run the gamut from really crude instruments that show no pride in craftsmanship to shanks that look like they are

auditions for the TV show *Forged in Fire*. Things You Can Put in a Sock and Swing Around typically are usually not very creative. Motors from the box fans in the units seem to be the most common.

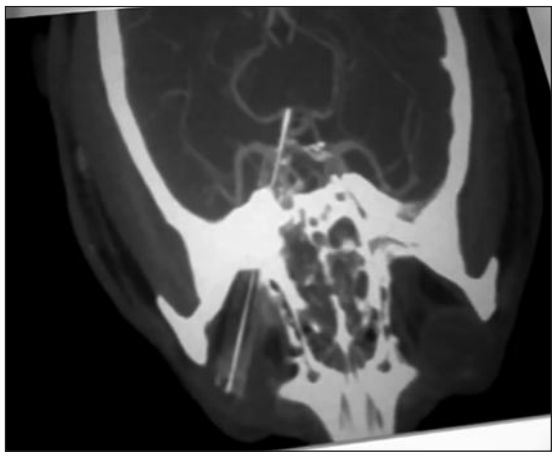
A "shank" filed from raw metal into something that would pass as a kitchen knife.

The only misdemeanors we prosecute are the ones committed by TDCJ staff. Those usually fall under the categories of Official Oppression.[6] These are tough cases because correctional officers have to be given a lot of leeway to keep dangerous offenders under control. But there are still plenty of cases where the force used by staff is excessive and amounts to unjustifiable assault or something similar.

Felony cases committed by staff are unfortunately just as common. In a prison system where correctional officers often begin their careers as young as 18 years old, without much in the way of salaries and without much life experience, they are easy prey for the sophisticated criminal syndicates that thrive in prison. That leads to a lot of Bribery and Possession cases as money and contraband are exchanged between staff and offenders.[7]

But of course, we have more than our share of violent offenses as well. Assault on a Public Servant cases are extremely common, both with deadly weapons and with serious bodily injury. The most violent crimes, as you can imagine, are between offenders. And guess how many witnesses we usually have in a crowded cafeteria of 50 when there's a gang hit that leaves someone moaning and gasping for his life in a pool of his own blood in the center of the room? That's right: none. Just a few dozen statements saying, "I didn't see anything."

ABOVE: A junior correctional officer's jaw was broken after a punch from a 16-year-old TJJD inmate. The gap is not a missing tooth, it is the full separation of the jaw at the gum-line. BELOW: An X-ray of a correctional officer's injury from when an offender stabbed him with a pencil through the eye and into his brain. The correctional officer survived.



And yes, there is sexual assault in prison, but it is incredibly hard to prosecute. Like free-world cases, there is often no other evidence besides the word of the victim. And like free-world cases, most often there has been a significant time lapse between the alleged assault and when it is reported. But unlike most free-world cases, victims in prison sexual assault cases actually have a strong incentive to fabricate the story, because reporting that you are a victim of a sexual assault almost certainly results in transfer to another prison.

Wednesday

From Hondo, I get to go back home for a day. This is a time to catch up on my intake process and get

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It's not at all uncommon for us to discover well into the process of working up a case that TDCJ has documents it's accumulated through its own investigation that we never received because the investigations are totally separate. Are those documents Brady*? Are they subject to CCP Art. 39.14? Usually not. But that doesn't mean there's not a big scuffle over it once anyone on either side of the case realizes those documents exist.*

ready for my Thursday and Friday dockets, once again in Bee County.

Although we are "special" when it comes to prosecuting and we have shiny badges that even say "special" on them, we still put our suit pants on one leg at a time just like all our fellow prosecutors. Accordingly, our intake process doesn't look so different from everyone else's throughout the state.

But one major difference is that we get our cases from a separate law enforcement entity that you've probably never heard of: the Office of the Inspector General, or OIG. When I started here, I thought "OIG!" was something you shouted at a punk-rock concert. It turns out I was totally wrong about that on a number of levels. The OIG turns out to have nothing to do with punk-rock, nor does it have anything to do with Biggie Smalls. The OIG is the law enforcement group dedicated to investigating prison crimes. Unlike SPU, people at the OIG *are* TDCJ employees. They are TCOLE-certified law enforcement officers, almost exactly like your local police agencies in every way, and there's usually at least one OIG investigator assigned to each prison unit in the state.

Because here's another important nugget to keep in mind when trying to understand prison investigations: TDCJ correctional officers and staff are *not* licensed law enforcement officers. On the one hand, TDCJ does actually perform its own administrative investigations into crimes committed in each unit, and its cooperation in sharing information from these investigations with OIG and the SPU is absolutely invaluable in the prosecution of our cases.

On the other hand, TDCJ has a prison to run, and sometimes it has to conduct its investigations in a way that is not ideal for the prosecution of a case. For example, confessions given to TDCJ staff as a result of direct questioning aren't admissible in court, even if the suspects have been *Mirandized*.[8] This is because failure to answer a TDCJ staff member's question is an administrative violation within TDCJ walls,[9] so any direct question asked by TDCJ staff of an inmate results in a *de facto* involuntary answer.

But OIG investigators aren't prison staff. They are governed by the same rules and analysis that you'd follow in determining if a confession given to one of your officers is admissible. The result is that in most of our cases, there is an interview done by OIG for the criminal investigation and another interview done by TDCJ for the administrative investigation. All of these TDCJ investigations usually result in an administrative disciplinary hearing conducted inside TDCJ. It looks and feels a whole lot like a criminal trial, and if an inmate is found guilty, there are consequences like loss of good time, loss of privileges, etc.

It's not at all uncommon for us to discover well into the process of working up a case that TDCJ has documents it's accumulated through its own investigation that we never received because the investigations are totally separate. Are those documents *Brady*? Are they subject to CCP Art. 39.14? Usually not. But that doesn't mean there's not a big scuffle over it once anyone on either side of the case realizes those documents exist.

After OIG has completed its investigation, it sends the case to SPU headquarters in Huntsville, where our crack staff of legal assistants scans them in and enters them into a case management system. When I receive notification that a new case is waiting for me, I download the offense report, all of the digital evidence such as surveillance videos and photos, and whatever else is waiting for me in the folder. Then I review it and decide to accept or decline the case. If it's accepted, I note that on a disposition sheet and email it back to Huntsville. Then I get started on indicting the case.

After the indictment is prepared, the SPU physically travels to the county where the case is based and presents the indictment.[10]

The process for placing SPU cases on dockets varies widely from county to county. In some counties, several of mine in fact, we make our own dockets and just turn them in to the district clerk. We then just essentially beg to be able to use the courtroom or any room at the courthouse whenever one is available to hear the cases.

In some counties, our dockets are rolled into the regular docket heard by the regular judges. In others, they are special "prison dockets" heard by visiting and retired judges. In others, we have absolutely no say whatsoever in the process—we just show up when we're told. It goes without saying, however, that throughout the state we rely heavily on the kindness of strangers. Or, they would be strangers if we weren't constantly in their offices asking for favors. Even so, we rely entirely on their kindness, which we receive in spades.

Once it's time to show up to a docket, we head out in teams of a prosecutor and an investigator. We each have a laptop, printer, and county vehicle.

At least two weeks in advance, the SPU investigator has to contact TDCJ and give it a list of offenders (that's what TDCJ calls inmates) who need to be transported to a specific court on a specific day. For safety reasons, TDCJ has a policy of transporting no more than 10 inmates at a time, so our dockets never have more than 10 actively incarcerated individuals. But the dockets could have more than 10 *cases* because not everyone we prosecute is presently incarcerated (for instance, in cases involving prison visitors, prison staff, and offenders who were incarcerated when they committed the charged offense but have since been released).

I know that to many prosecutors, a docket of anything less than 30 or 40 a day, five days a week sounds like a cakewalk. But there are 150,000 inmates in TDCJ, with another 875 incarcerated in TJJD facilities. We've got only 11 prosecutors to handle those cases from intake through the appellate process, so we do manage to stay pretty busy.

Thursday

Another 6:00 a.m. drive to Bee County brings beautiful scenery, rolling hills of pasture, and long, long delays behind different kinds of automobiles with "truck," "tractor," or "trailer" somewhere in their names. Today, I'm pleading a case involving a young correctional officer who was caught smuggling in copious amounts of drugs. This is an unusual case because very few people take this kind of risk with this kind of volume. The officer is young and has cooperated fully, and accordingly, I've made a low offer, which the defense snatched up immediately.

But there's a hitch: We're not in front of the normal prison-docket judge today. For reasons I can't explain here, even though we have a dedicated judge to hear our prison-docket cases in Bee County, sometimes our docket ends up in front of one of two other judges. This judge on this day is not accepting my plea, finding it too lenient, but he does me the courtesy of not formally rejecting it and instead resets it to be heard in front of our regular judge.

You know, it's funny: I spend all this time in courtrooms populated by murderers and rapists, and they don't make me the least bit uncomfortable. But put me in front of a judge I don't know, and I fall to pieces. This is one of the real hazards associated with #SPULife. From day-to-day, from county to county, I can never be quite sure what the rules are when I show up. I never have home-court advantage like most prosecutors are supposed to enjoy. Flexibility and diplomacy are at a premium in this gig.

In my beat, this is most especially true in Hidalgo County. Edinburg, its seat, is definitely not a rural place anymore, and with 11 district courts, Hidalgo is definitely not a rural county. It is what I would consider a "big" office of prosecutors, and each court has its own customs and procedures. My cases are randomly assigned to one of the 11 courts as they are indicted in Hidalgo, but never often enough in any one court to actually learn the individualized procedures. Every time a case is assigned to a new court, I feel like a 1L being called on to recite on the first day of class. I have to take a second here to thank the Hidalgo County prosecuting teams in each of these courts who have *literally* stood next to me and whispered what to say and do to keep me from accidentally being held in contempt when I'm down there. It's a huge testament to the way prosecutors have each other's backs. That's something you really start to learn when you travel across Texas the way we do.

Friday

This happens to be Friday the 13th in a whole week that has felt like Friday the 13th. My last day in Beeville and my last docket of the week explode into chaos. I've agreed to reduce the felony charges against some correctional officers from felony Tampering with Physical Evidence to misdemeanor Tampering with a Government Record. But then I realize that's not a lesser included. There *isn't* a lesser included. That means all of the cases have to be refiled as misdemeanors.

I don't know how most offices go about prepping paperwork in a situation like this, but for my investigator and I, on the road with our printers on a little table in a little courthouse in a little town, we don't have any staff to ask for help or any forms to rely on. We just have to generate brand-new paperwork ourselves for all of the defendants. It takes a few hours with everyone just kind of staring at us. It was one of those times you really wished you could tag-in a group of support staff stationed there in the courthouse to take care of the administrative tangles.

But that's #SPULife. Each prosecutor is es-

You know, it's funny: I spend all this time in courtrooms populated by murderers and rapists, and they don't make me the least bit uncomfortable. But put me in front of a judge I don't know, and I fall to pieces.

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sentially his or her own prosecutorial office. It's got its ups and downs, but in the end, it has more ups. Because like all prosecutors, we're making choices about what is going to happen to a case based on our own consciences and values guided by the facts. And sometimes, the reality of what prosecution really does to people hits us a little harder when we see them paraded in front of us in TDCJ whites and chains.

To me, that's when I'm most grateful to be a prosecutor, when I start to wonder about the justice system, when I wonder if correctional officers are fair to offenders, when I wonder if offenders can be rehabilitated, and when I wonder about unfair sentence lengths. Because as a prosecutor, I have both the power and the responsibility to take action over each one of those factors to make them become more the way I think they should be. And in that way, even though I'm not a prosecutor who helps to police the community I live in anymore, I'm an officer of the court who uses my influence to shape the criminal system as all prosecutors should: not to seek convictions, but to see that justice is done.

My week ends at a friend's house on Friday night, just relaxing after a lot of days on the road. He has a married couple visiting him from out of town, and the wife is a high-powered civil attorney in another state. She is on her phone well past 10 o'clock talking to unhappy clients with unreasonable demands. But they're paying her well, so she listens. And when she hangs up, she's clear with us that she's not a fan of anything in her job besides the pay.

And even though I'm pretty exhausted, as all of us in the prosecution game often are at the end of our weeks of dockets and victims and crime scenes and road trips, all I can think about is how lucky I am to do this job. Even if it means waiting in line behind tractor-induced traffic jams every now and again. ❇

Endnotes

[1] Here's a brief example of the kind of work they do every day so the rest of us don't have to: When deposing a sex offender one day, a colleague of mine asked about his first sexual experience. He asked her, "You mean people-sex?" Which meant exactly what you think it means. And that, in itself, is enough reason for you to say a quick "thank you" right now that the SPU Civil Division exists and that its folks are really, really good at their jobs.

[2] Tex. Penal Code §38.11.

[3] Gilligan, V. (Writer); Gould, P. (Writer); Cherkis, A. (Writer) & Morris, M. (Director) (2018). "Quite A Ride." In Bernstein, M. (Executive Producer), Better Call Saul. Austin, Texas: AMC.

[4] Tex. Penal Code §22.11.

[5] Tex. Penal Code §46.10.

[6] Tex. Penal Code §39.03.

[7] Tex. Penal Code §§36.02 and 38.11, respectively.

[8] *Lykins v. State*, 784 S.W.2d 32 (Tex. Crim. App. 1989).

[9] TDCJ Disciplinary Rules and Procedures for Offenders, Level 3, Rule 32.0.

[10] A handful of prosecutors from the counties we work with just read this sentence and said, "Hey! I've presented SPU cases when there was no way anyone from the SPU could make it!" Yes, that has absolutely happened and all of us appreciate it tremendously! You will be compensated for your efforts at a reception at the TDCAA event of your choosing.